Supreme Court, U.S.
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No. 97-

In the Supreme Court of the United States

OCTOBER TERM, 1997

ALTA BATES CORPORATION,
ALTA BATES MEDICAL CENTER, and
PATHOLOGY INSTITUTE, INC.,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
and
OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 29, AFL-CIO,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the mere unrealized potential for common control of operations and labor relations among separate, autonomously-run corporate entities is legally sufficient for a finding of single-employer status among the separate corporate entities.

2. Whether common ownership of various business entities is legally sufficient to establish single-employer status, even though there is no actual control of labor relations.

3. Whether the Ninth Circuit applied the correct legal standard to determine single-employer status.

LIST OF PARTIES AND AFFILIATES

The parties are Alta Bates Medical Center; Alta Bates Corporation; Pathology Institute, Inc. (together "Petitioners"); the National Labor Relations Board ("Respondent"); and the Office and Professional Employees International Union, Local 29, AFL-CIO (as an Intervenor).

Pursuant to Rule 29.6 of the Rules of the Supreme Court, Petitioners state that Sutter Health is the parent corporation of Alta Bates Corporation (now Alta Bates Health Systems). Alta Bates Health Systems is the parent corporation of Alta Bates Medical Center and Pathology Institute (now East Bay Health Services). Neither Alta Bates Corporation, Alta Bates Medical Center nor Pathology Institute have any non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND AFFILIATES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	1
DECISIONS BELOW	2
STATEMENT OF JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
1. Background	3
2. Proceedings	4
REASONS FOR GRANTING THE WRIT	7
I. THE NINTH CIRCUIT'S DECISION CREATES A SPLIT AMONG THE CIRCUIT COURTS AND AFFIRMS A MISINTERPRETATION OF PRECEDENT	8
A. The Ninth Circuit's Decision Applies the Wrong Legal Standard for the Single-Employer Doctrine	8
B. The Ninth Circuit's Opinion Affirms a Decision Based on Misinterpretation of Precedent	11

Page

II. THE LEGAL STANDARD OF ACTUAL VERSUS POTENTIAL CONTROL IN THE CONTEXT OF THE SINGLE-EMPLOYER DOCTRINE IS A QUESTION OF VAST IMPORTANCE FOR ALL COMMONLY OWNED ENTITIES 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

	Page(s)
American Fed'n of Television & Radio Artists v. NLRB, 462 F.2d 887 (D.C. Cir. 1972)	13
Bachman Machinery Co. v. NLRB, 266 F.2d 599 (8th Cir. 1959)	12, 17
Boich Mining Co. v. NLRB, 955 F.3d 431 (6th Cir. 1992)	13
J.G. Roy & Sons Co. v. NLRB, 251 F.2d 771 (1st Cir. 1958)	12
J.M. Tanaka Construction, Inc. v. NLRB, 675 F.2d 1029, *reh'g denied*, 675 F.2d 1029 (9th Cir. 1982)	13, 14
Limbach Co. v. Sheet Metal Workers Int'l Ass'n, 949 F.2d 1211 (3d Cir. 1991)	13
Miami Newspaper Pressmen's Local No. 46 v. N.L.R.B., 322 F.2d 405 (D.C. Cir. 1963)	5, 12
NLRB v. Denver Bldg. & Constr. Co., 341 U.S. 675 (1951)	19
NLRB v. Don Burgers Construction Corp., 596 F. 2d 378 (9th Cir. 1979), *cert. denied*, 444 U.S. 940 (1979)	5
NLRB v. Transcontinental Theaters, Inc., 568 F.2d 125 (1978)	14
Radio Union v. Broadcast Service, 380 U.S. 255 (1965)	5
Royal Typewriter Co. v. NLRB, 533 F.2d 1030 (8th Cir. 1976)	14, 16, 17
Sakrete of Northern California, Inc. v. NLRB, 332 F.2d 902 (9th Cir. 1964)	14-17

TABLE OF AUTHORITIES

CASES

	Page(s)
Sheet Metal Workers Int'l Ass'n v. Atlas Sheet Metal Co., 384 F.2d 101 (5th Cir. 1967)	13
Soule Glass & Glazing Co. v. NLRB, 652 F. 2d 1055 (1st Cir. 1981)	5
Board Decisions	
Drivers, Chauffers and Helpers Local No. 639 (Poole's Warehousing), 158 N.L.R.B. 1281 (1966)	5, 11
Family Laundry, Inc., 121 N.L.R.B. 1619 (1958)	16
General Teamster, Warehouse and Dairy Employees (Courtney & Plummer), 175 N.L.R.B. 630 (1969)	11
Gerace Construction, Inc., 193 N.L.R.B. 645 (1971)	11, 14
Los Angeles Newspaper Guild, Local 69, 185 N.L.R.B. 303 (1970)	11, 14, 16
Teamsters Local 749 (Transport, Inc.), 218 N.L.R.B. 1330 (1975)	11
Teamsters Local Union No. 50 (E.J. Dougherty Oil), 269 N.L.R.B. 170 (1984)	11
Television Artists AFTRA, Washington-Baltimore Local (Hearst Corp.), 185 N.L.R.B. 593 (1970)	11

TABLE OF AUTHORITIES

Board Decisions

	Page(s)
National Labor Relations Act 29 U.S.C. § 158(b)(4)	19, 20
United States Code Title 28, Section 1254(1)	4
National Labor Relations Act 29 U.S.C. § 151, et. seq.	3, 4

Other Authorities

Stephen F. Befort, *Labor Law and the Double-Breasted Employer*, 1987 Wis. L. Rev. 67	16

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PETITION FOR A WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Alta Bates Corporation ("ABC"), Alta Bates Medical Center ("ABMC"), and Pathology Institute, Inc. ("PI") respectfully petition for a writ of certiorari to review an order of the United States Court of Appeals for the Ninth Circuit affirming a decision by the National Labor Relations Board ("the Board") which affirms the holding of an Administrative Law Judge ("ALJ") that, although ABC, ABMC and PI do not actually exercise common control over each other's operations and labor relations, because they have the potential to exercise such control, these separate entities constitute a single employer for purposes of the National Labor Relations Act (the "NLRA" or the "Act"), 29 U.S.C. § 151 et seq. The Ninth Circuit's decision conflicts

with decisions of other circuit courts (including the First, Third, Fifth, Sixth, Eighth and District of Columbia Circuits) and represents a sea change in the law with respect to the single-employer doctrine as established and applied by the courts and the Board over the past four decades.

DECISIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, issued June 4, 1997, appears at 1997 WL 303259 and in table format at 116 F.3d 482. The Court of Appeals has not certified the opinion for publication. A reproduction of the opinion appears in the Appendix accompanying this petition at pages 2a-5a. The decision and order of the Board, issued on March 27, 1996, which incorporates the decision of the ALJ appears at 320 N.L.R.B. 1050, and in the Appendix accompanying this petition at pages 6a-69a.

STATEMENT OF JURISDICTION

The Court of Appeals filed its opinion on June 4, 1997. A timely petition for rehearing was denied on July 17, 1997. This petition is being timely filed within 90 days of the denial of the petition for rehearing. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the National Labor Relations Act, 29 U.S.C. § 151, et seq. The pertinent language of the statute is set forth in the Appendix at pages 70a-71a.

STATEMENT OF THE CASE

1. Background

This case concerns the application of the "single-employer" doctrine as developed by the Board and the courts over the past four decades. Pursuant to this doctrine, the Board may treat two or more otherwise separate legal entities as a single employer for purposes of determining whether they have complied with federal labor laws, depending on the extent of integration between the two entities. To determine whether separate entities constitute a single employer for purposes of the National Labor Relations Act (" the NLRA" or "the Act"), the Board considers four factors: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership and financial control. *See Radio Union v. Broadcast Service*, 380 U.S. 255, 256, 85 S.Ct. 876, 877 (1965). Although none of the four factors is controlling, and all of them need not be present for a single-employer finding, the Board and the Courts consider the centralized control of labor relations factor as the most critical of the four. *Soule Glass & Glazing Co. v. NLRB*, 652 F. 2d 1055, 1075 (1st Cir. 1981); *NLRB v. Don Burgers Construction Corp.*, 596 F. 2d 378, 384 (9th Cir. 1979), *cert. denied*, 444 U.S. 940 (1979). In applying these factors, the Board and the courts have required a finding of the actual exercise of centralized control of labor relations, rather than the mere potential for centralized control to establish single-employer status. *See e.g. Drivers, Chauffers and Helpers Local No. 639 (Poole's Warehousing)*, 158 N.L.R.B. 1281, 1286 (1966); *Miami Newspaper Pressmen's Local No. 46 v. N.L.R.B.*, 322 F.2d 405, 409 (D.C. Cir. 1963).

In this case, ABMC, an acute care hospital, in June 1992 took over the operations of PI, a financially failing laboratory service for hospitals. In doing so, ABMC

reduced PI's operations from numerous sites to just two locations, and hired a reduced number of former PI employees to staff the two sites. Until PI's closing, Local 29, Office and Professional Employees International Union (the "Union") represented all PI medical laboratory technologists, and was party to a collective bargaining agreement with PI, which was in effect from February 1, 1991 through October 31, 1993. ABMC declined to recognize the Union as the bargaining representative of the former PI employees it now employed and, accordingly, refused to honor the collective bargaining agreement between the Union and PI. Arguing that ABMC, PI and ABC were a single employer, and thus, that ABMC was bound by PI's collective bargaining agreement, the Board filed an unfair labor practice charge against ABMC, PI and ABC.[1]

2. Proceedings

On August 31, 1994, an Administrative Law Judge ("ALJ") found that ABMC committed an unfair labor practice by failing to honor PI's collective bargaining agreement with the Union. Recognizing that there was generally no dispute among the parties with respect to the underlying facts, and relying on the four-prong single-employer test, the ALJ found that ABMC, ABC, and PI constituted a single employer. In analyzing the four factors of the test, the ALJ held as follows: (1) There was common ownership because ABC and ABMC held shares of PI and because there was some overlap on the boards of the separate entities. (For example, of 18 members on the boards of both ABMC and ABC, 8 served on both boards; of 12 members on PI's board, 2 served on the board of either ABC or ABMC.) (2)

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[1] ABC and ABMC at the time were California non-profit public benefit corporations. ABC is one of two members (the equivalent of shareholders) of ABMC. ABC and ABMC together owned between 85% and 96% of PI's shares at the relevant time. (App. at 19a-21a.)

There was common management among the facilities due to the overlap of members between the three boards of directors. The ALJ held that "overall control of critical matters at the policy level," was more important to the single-employer analysis than the "actual exercise of such control." (App. at 47a.) (3) There was some evidence of an interrelation of operations, however limited. (4) With regard to centralized control of labor relations — the most important of the four criteria — the ALJ concluded that while none of the entities actually exercised actual extensive control over the labor relations of the others — "Obviously, there has not been an actual exercise of labor relations control here that is so extensive and intrusive as occurs, for example, when a single proprietor operates two interrelated small companies each of which employs but a handful of employees." (App. at 51a.) — it was "only necessary to conclude that there had been an ability by one entity to exercise 'clout' over labor relations of the other." (App. at 51a.) The ALJ also found that there had been "no evidence that Respondents ABMC and PI control Respondent ABC's management or labor relations . . . Similarly, there is no evidence in those areas of Respondent PI's control over Respondent ABMC." (App. at 51a.) In effect, the ALJ ignored the lack of evidence of centralized control of labor relations because he decided to create a new legal standard that a finding of the mere potential to control was sufficient to constitute actual centralized control. The new legal standard adopted by the ALJ, as discussed in detail below, directly conflicts with the law established by the Board and several other circuit courts.

ABC, ABMC, and PI sought Board review of the ALJ's opinion, contending that the mere potential for control does not evince centralized control of labor relations.[2] In

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[2] In Respondents' Exceptions to the Decision of the Administrative Law Judge, ABC and ABMC specifically filed an exception to the

a decision and order issued on March 27, 1996, without even addressing the actual versus potential control issue, the Board in a one-sentence footnote affirmed the ALJ's findings that ABC, ABMC, and PI constituted a single employer: "In agreement with the judge's findings, we reject the Respondents' contention that there is insufficient evidence of centralized control of labor relations." (App. at 5a n.1.) Because the Board simply affirmed the ALJ's decision, it held that the mere potential to control labor relations is sufficient to establish centralized control of labor relations, as required by the four-prong test. The Board's decision indicates a misunderstanding of the issue presented. The question is not whether there was sufficient evidence of centralized control of labor relations, but whether the appropriate legal standard requires the *actual* exercise of control, as opposed to the mere *potential* for such control, for a single-employer finding.

ABC, ABMC, and PI next petitioned the United States Court of Appeals for the Ninth Circuit for review of the Board's order. The Court of Appeals' jurisdiction was based upon § 160(f) of the NLRA, 29 U.S.C. § 160(f). In an unpublished memorandum and order filed on June 4, 1997, the Court similarly failed to address the actual versus potential control issue and simply found that substantial evidence existed to support the decision of the NLRB, and affirmed the Board's order. (App. at 3a.) Like the Board, the Ninth Circuit also misconstrued the issue. The primary issue is not whether sufficient evidence existed, but whether the correct legal standard was applied to the evidence. As ABC, ABMC and PI argued in their petition for review to the Ninth Circuit, "the ALJ simply made new law" when it

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"ALJ's ruling that merely potential rather than actual control of labor relations is necessary to establish common control of labor relations." (App. at 65a.) Excerpts from the argument of ABC and ABMC in support of their exception to the ALJ's holding can be found on pp. 67a-69a in the Appendix.

held that the single-employer doctrine only required "the ability to exercise clout over labor relations of others" — new law that conflicts with the standard repeatedly enforced by the NLRB and other circuit courts that "actual control over labor relations is required, and mere potential control by a parent company is insufficient." (App. at 71a.)

On June 17, 1997, ABC, ABMC, and PI petitioned the Ninth Circuit for rehearing and suggested rehearing *en banc* to reconsider the affirmation of the Board's order. The Ninth Circuit denied the petition for rehearing on July 17, 1997.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's affirmation of the Board's affirmation of the ALJ's ruling, which was based on the erroneous legal conclusion that only the mere potential, instead of actual, control of operations and labor relations is required to find that separate entities constitute a single employer, creates a split among the circuit courts, and conflicts with every other circuit court to decide this issue directly, as well as numerous Board decisions. The Ninth Circuit's decision represents a sea change in well-established law, with significant consequences for employers — especially with respect to the Act's prohibition on secondary boycotts.[3] The Ninth Circuit's failure to overturn the Board's decision acts as a signal to other unions that contrary to established law, all commonly owned businesses — regardless of the degree or complete absence of any actual exercise of common control among the entities — may be considered a single employer. By leaving the Board's decision intact, the Ninth Circuit

[3]Section 8(b)(4)(B) of the Act prohibits unions from striking or picketing employers with whom it does not have a labor dispute. To do so is considered an illegal "secondary boycott" — the Act only allows strikes and picketing against the employer with whom the union has the primary dispute. 29 U.S.C. § 158(b)(4)(B). (App. at 63a.)

provides unions with precedental authority that any commonly owned entities are a single employer. Because of the potential impact the decision will have on all commonly owned businesses, further review is plainly warranted.

I.

THE NINTH CIRCUIT'S DECISION CREATES A SPLIT AMONG THE CIRCUIT COURTS AND AFFIRMS A MISINTERPRETATION OF PRECEDENT

A. The Ninth Circuit's Decision Applies the Wrong Legal Standard for the Single-Employer Doctrine

The Ninth Circuit's affirmance of the decision of the Board and the ALJ that the single-employer doctrine requires only the ability or potential for one entity to exercise control over the labor relations of other commonly owned entities goes against the vast weight of authority established through numerous Board and court decisions over the last four decades, and creates a split among the circuits. As discussed herein, the First, Third, Fifth, Sixth, Eighth, and District of Columbia Circuits have either directly or indirectly held that actual exercise of common control is required to find single-employer status, and that potential control simply is not enough. (See discussion, *infra*, pp. 9-11.)

Early on, the Board directly addressed the issue of whether actual common control as opposed to the mere potential for common control was required in finding single-employer status.

> Common ownership alone is not sufficient. There must be in addition such actual or active common control, as distinguished from merely a potential, as to denote an appreciable integration of operations and management policies.

Drivers, Chauffeurs and Helpers Local No. 639 (Poole's Warehousing), 158 N.L.R.B. 1281, 1286 (1966).[4] *See also*, Twenty First Annual Report of the National Labor Relations Board (1956) at 15 (In applying the single-employer doctrine, "[t]he Board has declined in several cases to find integration merely upon the basis of common ownership or financial control").

Even before the Board expressly articulated its position in *Poole's Warehousing*, several circuit courts of appeal held that only actual, exercised control of operations and labor relations suffices to show that separate entities constitute a single employer. The Court of Appeals for the District of Columbia Circuit, for example, enforced the Board's *Miami Newspaper Pressmen's* order by stating explicitly what the Board's decision had implied: "There must be something more in the form of common control, as it is usually phrased, denoting an actual, as distinct from merely a potential, integration of operations and management poli-

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[4]The Board has since repeated this proposition again and again. See, e.g., *Teamsters Local Union No. 50 (E.J. Dougherty Oil)*, 269 N.L.R.B. 170, 174 (1984) ("Moreover, it is active rather than potential control which is significant."); *Teamsters Local 749 (Transport, Inc.)*, 218 N.L.R.B. 1330, 1334 (1975) (noting "well-settled" proposition that common control must be actual or active); *Gerace Construction, Inc.*, 193 N.L.R.B. 645, 645 (1971) ("[S]uch common control must be actual or active, as distinguished from potential control."); *Television Artists AFTRA, Washington-Baltimore Local (Hearst Corp.)*, 185 N.L.R.B. 593, 598–99 (1970), enf'd, 462 F.2d 887, 892 (D.C. Cir. 1972) ("[C]ommon ownership alone is not sufficient, nor mere existence of a potential for common control."); *Los Angeles Newspaper Guild, Local 69*, 185 N.L.R.B. 303, 304 (1970), enf'd, 443 F.2d 1173 (9th Cir. 1971) (holding that separate entities are not single employer "if neither the subsidiary nor the parent exercises actual or active, as opposed to merely potential control over the day-to-day operations or labor relations of the other"); *General Teamster, Warehouse and Dairy Employees (Courtney & Plummer)*, 175 N.L.R.B. 630 (1969) (quoting *Poole's Warehousing* principle).

cies." *Miami Newspaper Pressmen's Local No. 46 v. NLRB*, 322 F.2d 405, 409 (D.C. Cir. 1963). Before that, in *Bachman Machinery Co. v. NLRB*, 266 F.2d 599 (8th Cir. 1959), the Eighth Circuit overturned a Board's single-employer finding because "the evidence fell short of establishing that both companies were under such actual common management as to make them allies and a single employer." *Id.* at 605 (emphasis added). Finally, the First Circuit in 1958 similarly overturned a Board finding that separate entities constituted a single employer because: "There was of course potential common control, but this is always possible where there is common ownership." *J.G. Roy & Sons Co. v. NLRB*, 251 F.2d 771, 773 (1st Cir. 1958).

Furthermore, the circuit courts of appeals that have heard single-employer cases since the *Poole's Warehousing* decision uniformly have agreed with the Board and district courts that the single-employer doctrine requires actual, as opposed to mere potential control of labor relations and integration of operations. *See, e.g., Boich Mining Co. v. NLRB*, 955 F.3d 431, 424 (6th Cir. 1992) (agreeing with *Teamsters Local 50 (E.J. Dougherty Oil)* that actual control is significant factor); *Limbach Co. v. Sheet Metal Workers Int'l Ass'n*, 949 F.2d 1211, 1258–59 (3d Cir. 1991) (upholding jury instruction, "Common ownership and potential control alone will not establish that otherwise separate employers are a single employer. Rather, there must be actual or active control over the labor relations or the overall operations."); *American Fed'n of Television & Radio Artists v. NLRB*, 462 F.2d 887, 892 (D.C. Cir. 1972) ("As the Board correctly held . . . the test is not whether an unexercised power to control exists."); *Sheet Metal Workers Int'l Ass'n v. Atlas Sheet Metal Co.*, 384 F.2d 101, 107 (5th Cir. 1967) (refusing to find that two separate entities were single employer even where facts "clearly show potential common control through stock ownership and identical directors and officers").

Indeed, the Ninth Circuit itself has reiterated the Poole's principle in several cases. In *J.M. Tanaka Construction, Inc. v. NLRB*, 675 F.2d 1029, *reh'g denied*, 675 F.2d 1029 (9th Cir. 1982), the president and partial owner of an unprofitable, unionized state-wide construction business closed shop and opened a new single-city business. Although the new business employed engineers exclusively from the prior state-wide business, the president refused to recognize the engineers' contract. The Ninth Circuit found the two businesses to be a single employer because the same man controlled daily operations and labor relations for both businesses. *Id.* at 1034. The court specifically emphasized not overlap in higher officers, but control of day-to-day operations and labor relations. *Id.* Citing *Poole's*, the court repeated "that it is actual and not merely potential control that is determinative." *Id.*

The *Tanaka* opinion accords with various other decisions of the Ninth Circuit. In 1971, for example, that court enforced the Board's order in *Los Angeles Newspaper Guild, Local 69, supra*, which clearly reiterated the *Poole's* principle that control must be actual and exercised. *See Los Angeles Newspaper Guild, Local 69 v. NLRB*, 443 F.2d 1173 (9th Cir. 1971), *enforcing* 185 N.L.R.B. 303 (1970). *See also NLRB v. Transcontinental Theaters, Inc.*, 568 F.2d 125 (1978) (quoting *Gerace Construction, supra*, that common control must be actual or active). Thus, the Ninth Circuit has ignored its own precedent in order to render a decision that brings it into conflict with every other circuit that has ruled directly on the matter.

B. The Ninth Circuit's Opinion Affirms a Decision Based on Misinterpretation of Precedent

The ALJ purported to base his reasoning about actual versus potential control upon two court of appeals cases, *Sakrete of Northern California, Inc. v. NLRB*, 332 F.2d 902 (9th Cir. 1964), and *Royal Typewriter Co. v. NLRB*, 533

F.2d 1030 (8th Cir. 1976). The ALJ generally misinterpreted the two cases, and to the extent that the cases lend any support to his theory, they oppose the great weight of precedent on this issue.

Deciding whether ABC, ABMC, and PI shared enough common management to constitute a single employer, the ALJ quoted the Ninth Circuit's decision in *Sakrete, supra*, for the proposition that "single-employer determinations focus more upon the existence 'of overall control of critical matters at the policy level' . . . than upon ongoing actual exercise of such control." (App. at 53a (citation omitted).) In quoting from *Sakrete* in support of his conclusion, however, the ALJ completely misconstrued the meaning of that opinion. First, the ALJ took this quotation out of context, in that he failed to recognize that the court specifically insisted that the "overall control of critical matters at the policy level" is not just the potential control inherent in any common ownership, but — additionally — actual exercise of that control.

> But while the power to control on all levels may be a concomitant of common ownership or financial control, and so embraced within that particular Board criterion [of common ownership and financial control], the actual exercise of its power is not. The three other criteria deal not with power and authority, as such, but with its exercise. Thus interrelationship of operations, centralized control of labor relations, and common management, on any level, are considerations in addition to the factor of common ownership or financial control.

Sakrete, 332 F.2d at 907. The ALJ ignored this requirement that separate entities must exercise *actual* control over each other's operations, even if at the policy, instead of the local, level.

Second, and even more importantly, *Sakrete* was a jurisdictional case; the court used the single-employer doctrine solely in order to determine whether the Board could exercise jurisdiction over an employer. The Board applies the single-employer doctrine much more liberally to jurisdictional cases than to cases in which the actual issue in controversy involves a single-employer doctrine, such as secondary boycotts or double-breasting.[5] Thus, although *Sakrete* did in fact allow for the actual exercise of control to exist at the policy level, non-jurisdictional cases specifically require that entities exercise that control over day-to-day operations. *See Los Angeles Newspaper Guild, Local 69 (San Francisco Examiner)*, 185 N.L.R.B. 303, 304 (1970), *enforced*, 443 F.2d 1173 (9th Cir. 1971), cert. denied, 404 U.S. 1018 (1972). Whatever support for his contentions the ALJ might have wrenched out of *Sakrete*, he failed completely to account for differences in applying the single-employer doctrine to jurisdictional cases and to the instant case.

Following his discussion of management operations, the ALJ next contended that centralized control of labor relations need not be actual either: "With specific regard to labor relations, it is not crucial that one of Respondent's officials did not directly oversee the work forces of the other two." (App. at 48a.) The ALJ based this proposition on a misreading of *Royal Typewriter Co. v. NLRB*, 533 F.2d

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[5] A comparison of Board's application of single-employer doctrine to jurisdictional cases and to double-breasting cases appears in Stephen F. Befort, *Labor Law and the Double-Breasted Employer*, 1987 Wis. L. Rev. 67. For an example of the Board's application of the single-employer doctrine to a jurisdictional case, see *Family Laundry, Inc.*, 121 N.L.R.B. 1619 (1958).

1030, 1043 (8th Cir. 1976). Specifically, the ALJ quoted two separate propositions from *Royal Typewriter*:

> "In assessing the appropriateness of single-employer treatment, the fact that day-to-day labor matters are handled at the local level is not controlling," because the "more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries."

(App. at 48a (citation to *Royal Typewriter* omitted).) As an initial matter, the ALJ failed to include the last part of that quotation, which continues:

> . . . *and* whether [the controlling company's] course of conduct encouraged or permitted the local negotiators to so represent the situation to union negotiators for the purpose of achieving a tactical or strategic objective.

Royal Typewriter, 533 F.2d at 1043 (emphasis added). Thus, *Royal Typewriter* requires more than just the means to control labor relations; it requires an actual course of conduct at the local level to demonstrate the existence of that clout. Consistent with this requirement, the Eighth Circuit noted that the controlling company in *Royal Typewriter* had staffed Royal with its own employees, retained control over fundamental decisions, and positioned itself to control the course of Royal's negotiations. *Id.* at 1042–43. Thus, the court did see in the record sufficient evidence of actual control of labor relations. To the extent that the ALJ in the instant case could read *Royal Typewriter* to require only potential control of management operations or labor relations, the opinion would oppose the great weight of precedent — including the Eighth Circuit's own decision in *Bachman Machinery Co. v. NLRB*, 266 F.2d 599 (8th Cir. 1963) — and require clarification.

The Ninth Circuit has affirmed a misreading of precedent. The ALJ twisted *Sakrete* and *Royal Typewriter* to fit his requirements. He also ignored extensive Board and court precedent, cited above, stating that, in non-jurisdictional cases, actual control of operations and labor relations determines whether separate entities constitute a single employer. The Ninth Circuit's enforcement of the ALJ and the Board order thus brings it, too, into conflict with that precedent.

II.

THE LEGAL STANDARD OF ACTUAL VERSUS POTENTIAL CONTROL IN THE CONTEXT OF THE SINGLE-EMPLOYER DOCTRINE IS A QUESTION OF VAST IMPORTANCE FOR ALL COMMONLY OWNED ENTITIES

The ALJ's decision, which the Board and the Ninth Circuit affirmed without explanation, significantly changes the legal standard — applied by other circuit courts as well as the Board — upon which a finding of single-employer status among separate corporate entities is based. The consequences of this inexplicable sea change in the law for all commonly owned but otherwise autonomously run corporate entities cannot be underestimated. The three primary consequences of a finding of single-employer status among separate entities of the same company are: (1) each entity is financially liable for the wrongs committed by the other (i.e., charges of discrimination or unfair labor practices); (2) depending on certain factors, one or all of the entities may be bound by a collective bargaining agreement entered into by another entity in the group (as the ALJ found here); and (3) most significantly, any entity who is part of the single employer is subject to picketing by a union who has a labor dispute with any other entity of the single employer. Thus, for all companies that are commonly owned, a single-employer determination nullifies the Act's § 8(b)(4)

prohibition on secondary boycotts, which Congress intended for the protection of neutral employers from the labor disputes of others.

If the Board may find that separate entities constitute single employers based solely on the potential for common control of management functions and labor relations, then virtually all commonly owned businesses are single employers, and the Ninth Circuit's decision repeals the Act's § 8(b)(4) secondary boycott prohibition with respect to such entities. The Ninth Circuit's decision will force businesses to deal with the labor disputes of their commonly held, but otherwise unaffiliated, distant cousins. Without a doubt, that result runs contrary to the congressional intent for § 8(b)(4) to "shield[ ] unoffending employers and others from pressures in controversies not their own," *NLRB v. Denver Bldg. & Constr. Co.*, 341 U.S. 675, 692 (1951).

Furthermore, as in the instant case, the Ninth Circuit's decision will force employers who hire workers away from any commonly owned business to recognize collective bargaining agreements they neither negotiated nor agreed to. The very fact that ABMC has its own negotiators who have never joined PI at the bargaining table indicates that the two entities are not the same employer with regard to labor relations. (App. at 48a-50a.) The Ninth Circuit will nonetheless bind ABMC to an agreement created by PI's negotiators— essentially penalizing ABMC for choosing to hire former PI workers. Under this decision, an employer must hesitate to hire workers who previously worked for any business in which the employer's parent corporation may have an ownership interest, because an employer who does so can lose its own rights to bargain with the representatives of those workers.

The Ninth Circuit's decision thus represents two important changes in labor law: (1) an effective repeal of the Act's § 8(b)(4) prohibition on secondary boycotts as it

applies to commonly owned but otherwise autonomously operated businesses, and (2) the removal of bargaining rights from employers who hire workers from businesses under common ownership.

CONCLUSION

Because the Ninth Circuit has applied the wrong legal standard and brought itself into conflict with the other circuits on a question of vast national importance for labor relations, and for all of the foregoing reasons, Petitioners ABC, ABMC and PI urge the Court to grant certiorari in this case.

DATED: September 8, 1997.

Respectfully submitted,

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ALTA BATES CORPORATION,
ALTA BATES MEDICAL CENTER,
AND PATHOLOGY INSTITUTE, INC.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALTA BATES CORP.; ALTA BATES MEDICAL CENTER,
Petitioners,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent
OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 29, AFL-CIO
Respondent-Intervenor.
No. 96-70260
NLRB No. 32-CA-12599-1

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
ALTA BATES CORP.; ALTA BATES MEDICAL CENTER,
Respondents,
OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 29, AFL-CIO,
Respondent-Intervenor.
No. 96-70382
NLRB No. 32-CA-12599-1

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
PATHOLOGY INSTITUTE, INC.;
Respondent,
OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 29, AFL-CIO,
Respondent-Intervenor.
No. 96-70383
NLRB No. 32-CA-12927

NLRB No. 32-CA-125991

MEMORANDUM*

FILED
June 4, 1997
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board
Submitted May 8, 1997**
San Francisco, California

Before: HUG, Chief Judge, GOODWIN and HAWKINS, Circuit Judges.

Three employers petition the court for review of an NLRB decision finding them a "single employer"; a unit of medical technologists an "appropriate bargaining unit"; and holding the employers obligated to bargain with the union. The NLRB petitions for enforcement of its bargaining order.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36.3.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4

We affirm the NLRB decision and grant enforcement of the order.

The Board's finding of single employer status is primarily a finding of fact. *NLRB v. Big Bear Supermarkets No. 3*, 640 F.2d 924, 928-29 (9th Cir. 1980). We therefore affirm the Board if there is substantial evidence in the record to support its finding. *See NLRB v. Carson Cable TV*, 795 F.2d 879, 881 (9th Cir. 1986). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). It is "more than a scintilla but less than a preponderance." *Id.*

To determine whether two separate entities are a "single employer," the Board considers four factors: (1) common ownership; (2) common management; (3) interrelation of operations; and (4) centralized control of labor relations. *See South Prairie Construction Co. v. Local 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 802 n.3 (1976), (quoting *Radio Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965)).

To find a "single employer," all four factors need not be present. *NLRB v. Don Burgess Const. Corp.*, 596 F.2d 378, 384 (9th Cir. 1979). "Single employer status ultimately depends on all the circumstances of the case and is characterized by an absence of an arms length relationship found among integrated companies." *Id.*, *NLRB v. Big Bear Supermarkets No. 3*, 640 F.2d at 928. The NLRB adopted the detailed findings of the ALJ in concluding that the three entities were a "single employer." We conclude that there is substantial evidence to support the decision of the NLRB.

We must affirm the Board's choice of a bargaining unit unless there has been an abuse of discretion. *California Pacific Medical Center v. NLRB*, 87 F.3d 304, 308 (9th Cir. 1996). The Board need only choose an appropriate unit, but not necessarily the best unit. *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 610 (1991). We also defer to the Board when it interprets its own rules. *See NLRB v. Hudson Oxygen Therapy Sales Co.*, 764 F.2d 729, 733 (9th Cir. 1985).

A unit is appropriate for bargaining when there is a "community of interest" among the employees, as evidenced by their skills, duties, and working conditions. *Don Burgess,* 596 F.2d at 386. Courts have approved continued union representation of units which have undergone changes similar to those that occurred in this case so long as "there was no essential change in the business that would have affected employee attitudes towards representation." *See, e.g., Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 627 (9th Cir. 1983) (no essential change in working conditions: same work, same plant, same equipment). Here, the medical technologists continued to work at laboratories on site at the Medical Center. The business and needs of the Medical Center had remained the same, and so in essence did the work of the medical technologists.

We conclude that the Board did not abuse its discretion in deciding that this unit of medical technologists was still an appropriate bargaining unit.

The Employers also argue that the unit is now inappropriate under 29 CFR § 103.30 (Health Care Rules). The Health Care Rules enumerate eight appropriate bargaining units for acute care facilities. 29 CFR § 103.30(a). The Rules also provide three exceptions: cases that present extraordinary circumstances; cases in which nonconforming units already exist; and cases in which labor organizations seek to combine two or more of the eight specified units. All parties agree that a unit of medical technologists is not one of the eight enumerated units. At issue is whether this unit of medical technologists is properly an "existing nonconforming unit."

Since 1986 the union had represented an employer wide bargaining unit of all of Pathology's medical laboratory technologists, including those who had worked for Pathology at the Medical Center's premises. When pathology closed the Medical Center it staffed its laboratory exclusively with Pathology's medical laboratory technologists. The NLRB reasonably concluded that this was an "existing nonconforming unit." We affirm the finding of the NLRB.

ORDER ENFORCED.

*1 PATHOLOGY INSTITUTE, INC.;
ALTA BATES MEDICAL CENTER;
AND ALTA BATES CORPORATION
AND
OFFICE & PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 29, AFL-CIO
Cases 32-CA-12599-1 and 32-CA-12927
Dated, Washington, D.C.
March 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On August 31, 1994, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondents filed exceptions, a supporting brief, and an answering brief to the General Counsel and the Charging Party's exceptions; the General Counsel filed exceptions and a supporting brief; and the Charging Party filed exceptions, a supporting brief, and a reply brief to the Respondents' answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

1. The judge found, inter alia, that the Respondents, Pathology Institute, Inc. (PI), Alta Bates Medical Center (ABMC), and Alta Bates Corporation (ABC), are a single employer. We agree.[1]

2. The judge also found that although the Respondents were obligated to honor the terms of the 1991-1993 collective-bargaining agreement until its expiration date, they did

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[1] In agreement with the judge's findings, we reject the Respondents' contention that there is insufficient evidence of centralized control of labor relations.

not violate Section 8(a)(5) and (1) by thereafter refusing to recognize the Union. The General Counsel and the Charging Party have excepted to the judge's failure to find that the Respondents' obligation to recognize the Union continued after the expiration of the collective-bargaining agreement. For the reasons set forth below, we find merit in these exceptions.

The facts can be summarized as follows. Since 1986, the Union has represented an employerwide unit of all medical laboratory technologists employed by Respondent PI. Successive collective-bargaining agreements were negotiated and executed. The most recent collective-bargaining agreement between the Union and Respondent PI was effective from February 1, 1991, through October 31, 1993.

In June 1992, Respondent PI closed. Respondent ABMC took over Respondent PI's laboratory operations but reduced the number of facilities at which medical laboratory technologists were located to the two Respondent ABMC hospitals.[2] Although the laboratories were staffed with medical laboratory technologists previously employed by Respondent PI, Respondent ABMC refused to recognize the Union as the collective-bargaining representative of these employees and unilaterally implemented terms and conditions of employment different from those set forth in the contract between the Union and Respondent PI.

The main issue before us is whether the historic bargaining unit continued to be appropriate after the closing of Respondent PI. The judge found, and we agree, that under

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[2] In their exceptions, the General Counsel and Charging Party contend that, prior to the closing, Respondent PI's medical laboratory technologists worked at only one location in addition to the two hospital laboratories. The Respondents contend that Respondent PI employed medical laboratory technologists at multiple locations other than the two hospitals. Although the record and the judge's decision are not clear on this factual issue, we find it unnecessary to resolve the dispute because our finding, infra, that the postclosure unit is an existing nonconforming unit within the meaning of Sec. 103.30 of the Board's Rules does not depend on the number of nonacute care facilities included in the historic unit.

traditional representation principles "an employment transfer of represented employees from one to another of [the] entities [constituting a single employer] will not, of itself, obliterate a historic unit and whatever obligations have arisen as a result of its existence." The judge also found, and again we agree, that "[t]his is so even if, as a result of that transfer, the unit is diminished in scope or composition."

*2 The judge reasoned, however, that a deviation from these principles was warranted here because, after the closing of Respondent PI, the scope of the bargaining unit was reduced to only acute care hospital locations. Thus, the judge found applicable the Board's Rule on collective-bargaining units in the health care industry and pointed out that a unit confined to medical laboratory technologists is not one of the eight appropriate units enumerated in Section 103.30(a) of the Rule. The judge recognized that the Rule specifically excepts "existing non-conforming units," but he found that after June 1992 the unit was "substantially different" from the historic unit and thus was not an "existing" nonconforming unit within the meaning of the Rule. Consequently, the judge concluded that the post-June 1992 unit was not an appropriate one and could not be the subject of a bargaining order. We disagree.

We initially note that Section 103.30(a) sets forth the specific units appropriate "for petitions filed pursuant to Section 9(c)(1)(A)(i) or 9(c)(1)(B) of the . . . Act." The instant case does not involve such a petition. Assuming, however, that the Rule is applicable in unfair labor practice cases, we find, contrary to the judge, that the unit in issue here is an "existing nonconforming unit" within the meaning of Section 103.30(a).

Specifically, we find that after June 1992, the unit, although smaller, is essentially the same unit of medical laboratory technologists that existed prior to closing the nonacute care facilities. Thus, the medical laboratory technologists continued to be employed by the remaining entities constituting a single employer, and the unit remained employerwide in scope. In addition, all of the medical laboratory technologists employed after Respondent PI's closure

were employees of Respondent PI prior to its closure. Therefore, we conclude that the unit "existing" after the closing of Respondent PI was substantially the same as the unit "existing" prior to the closing.

Moreover, nothing in Section 103.30 suggests that an employer in the health care industry may cease recognizing a union as the representative of its employees in an existing unit merely because of a reduction in the number of unit employees or because of a closure of the nonacute care portion of an employer's facilities. On the contrary, permitting an employer to withdraw recognition under such circumstances would be inconsistent "with the design and purpose of our decision to engage in rulemaking — to further the long-standing policy of promoting industrial and labor stability."[3]

For these reasons, we find that even if the Rule applies to unfair labor practice cases, the instant case falls under the "existing non-conforming units" exception. Therefore, the appropriate unit issue must be decided not under the Rule, but under traditional representation principles. We agree with the judge's implicit finding that the post-June 1992 unit is appropriate under such principles. Thus, as the judge found, the unit that remained after the closure of Respondent PI "contravenes no statutory policy and works no injustice to Respondents." Nor was it a unit "which totally lacked viability. It was what was left of a historic unit. It was employer-wide in scope, consisting of all medical laboratory technologists who remained employed by Respondents." In sum, the change in the size of the unit resulting from the Respondents' reduction of its laboratory operations did not "destroy the continued appropriateness of [the] historic unit." Accordingly, the Respondents' refusal to recognize the Union as the collective-bargaining representative of its medical laboratory technologists, and their failure to apply to unit employees the collective-bargaining agreement be-

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[3] Kaiser Foundation Hospitals, 312 NLRB 933, 935 (1993).

tween Respondent PI and the Union, violated Section 8(a)(5) and (1) of the Act.[4]

CONCLUSIONS OF LAW

*3 By failing and refusing to recognize the Union as the collective-bargaining representative of the medical laboratory technologists at Alta Bates Medical Center, and by failing and refusing to apply to unit employees their collective-bargaining agreement with the Union, Respondents Pathology Institute, Inc., Alta Bates Corporation, and Alta Bates Medical Center, a single employer, violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondents are a single employer which engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondents shall be required to recognize and, on request, bargain with the Union as the collective-bargaining representative of all medical laboratory technologists employed at the Alta Bates Medical Center campuses. The Respondents shall also be required to make whole the medical laboratory technologists for any loss of earnings and other benefits suffered as a result of the Respondents' failure to apply to its unit employees the collective-bargaining agreement between the Union and Respondent PI, as prescribed in Ogle Protection Service, 183 NLRB 682 (1970), with interest computed in the manner prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987). In addition, the Respondents shall make whole all benefit funds for all contributions that should have been made under the collective-bargaining agreement, including any additional

[4] In view of our finding that the Respondents, as a single employer, violated Sec. 8(a)(5) of the Act by refusing to recognize the Union after Respondent PI's closure, we find it unnecessary to pass on the judge's finding that no alter ego relationship existed among the Respondents.

amounts due the funds computed in the manner prescribed in Merryweather Optical Co., 240 NLRB 1213 (1979), and reimburse employees for any losses or expenses they may have incurred because of the Respondents' failure to make payments to those funds, in the manner prescribed in Kraft Plumbing & Heating, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir.1981), with interest prescribed in New Horizons for the Retarded, supra.[5]

ORDER

The National Labor Relations Board orders that the Respondents, Pathology Institute, Inc.; Alta Bates Medical Center; and Alta Bates Corporation, Berkeley, California, their officers, agents, successors, and assigns, shall:

1. Cease and desist from (a) Failing and refusing to recognize Office & Professional Employees International Union, Local 29, AFL-CIO as the collective-bargaining representative of its medical laboratory technologists employed by Alta Bates Medical Center at its Ashby and Herrick Campuses.

(b) Failing and refusing to apply to unit employees the collective-bargaining agreement between Pathology Institute and the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the medical laboratory technologists employed by Alta Bates Medical Center at its

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[5]To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount the Respondents otherwise owe the fund.

Ashby and Herrick Campuses on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

*4 (b) Make whole all medical laboratory technologists, and all benefit funds, for any loss of income, contributions, or benefits, and for any expenses incurred in connection with those benefit fund losses by those employees, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination or copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at the Ashby and Herrick Campuses in Berkeley, California, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

William B. Gould IV
Chairman

Margaret A. Browning
Member

Charles I. Cohen

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[6]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Member

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

*5 The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to recognize Office & Professional Employees International Union, Local 29, AFL–CIO as the exclusive bargaining representative of all medical laboratory technologists employed by Alta Bates Medical Center at its Ashby and Herrick Campuses.

WE WILL NOT fail or refuse to apply to unit employees the collective-bargaining agreement between Pathology Institute, Inc. and the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of our medical laboratory technologists employed by Alta Bates Medical Center at its Ashby and Herrick Campuses on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL make whole our medical laboratory technologists, and all benefit funds, for any loss of income, contributions, or benefits suffered as a result of the failure to apply to those employees the collective-bargaining agreement between Pathology Institute, Inc. and the Union, and for any expenses incurred in connection with those benefit fund losses, with interest.

PATHOLOGY INSTITUTE, INC.; ALTA BATES MEDICAL CENTER; AND ALTA BATES CORPORATION

Barbara D. Davison, Esq., for the General Counsel.

Bradley W. Kampas, Esq. (Jackson, Lewis, Schnitzler & Krupman), of San Francisco, California, for Respondent Pathology Institute, Inc.

John V. Nordlund and D. Gregory Valenza, Esqs. (Jackson, Lewis, Schnitzler & Krupman), of San Francisco, California, for Respondents Alta Bates Corporation and Alta Bates Medical Center.

James E. Eggleston, Esq. (Eggleston, Siegel & LeWitter), of Oakland, California, for the Charging Party.

DECISION
STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge.

I heard this case on May 10 and 12 through 14, and on November 8 through 10, 1993, in Oakland, California. On June 22, 1992,[1] the original charge in Case 32-CA-12599-1 was filed and on September 9 a first amended charge was filed in that case. On January 8, 1993, the charge was filed in Case 32-CA-12927. On February 26, 1993, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued an order consolidating cases, amended consolidated complaint and notice of hearing, consolidating issues arising from those two charges for

[1] Unless stated otherwise, all dates occurred in 1992.

hearing and decision, and alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record,[2] on the briefs that were filed, and on my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

*6 The alternative allegations in this case arise from a mid-June closure of one entity and initiation of only a portion of its operations by a second entity which is an acute care hospital. The closure occurred during the term of a collective-bargaining contract between the closed entity and the bargaining agent — Office & Professional Employees International Union, Local 29, AFL-CIO (the Union)[3] — of employees in the single job classification of medical laboratory technologist. Because it commenced operating only a portion of the closed entity's operations, the hospital hired a reduced number of medical laboratory technologists. However, all of them were individuals whom the closed entity had employed before closing. Nonetheless, the hospital refused to recognize the Union as the bargaining agent of those employees. That refusal forms the basis of the General Counsel's first alternative allegation.

As pointed out above, the second entity is an acute care hospital. For acute care hospitals the Board has listed the only bargaining units which it regards as appropriate in the Board's Rules and Regulations, Series 8, Section 103.30(a) and (f). A unit confined to medical laboratory technologists is not one of them. In light of that fact, the General Counsel disavows specifically any theory of viola-

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[2]The motion to correct the official record of the proceedings is granted.

[3]At all material times the Union has been a labor organization within the meaning of Sec. 2(5) of the Act.

tion predicated upon successorship principles. Instead, the General Counsel and the Union focus on the relationship between the closed entity and the hospital, as well as upon their relationship with a third entity: a holding company which possesses interests in each of them. On the basis of that relationship, the General Counsel and the Union contend that the three of them are so interrelated that, in fact, they are a single-integrated enterprise which constitutes a single employer and, possibly also, an alter ego. If so, proceeds the General Counsel and Union's argument, there had been no actual change in employer of the technologists who continued working for the hospital after mid-June. Accordingly, their argument concludes, there had been an obligation to continue recognizing the Union, as the bargaining agent of those employees, and to honor the then-existing contract covering those employees. Failure to do so violated Section 8(a)(5) and (1) of the Act.

The three affected entities take issue with the factual portion of that argument. That is, they do not challenge the principle that a bargaining relationship is not extinguished by a mere nominal employment change of represented employees from one component to another of a single employer. Nor do they dispute the proposition that such related entities are obliged to continue honoring a collective-bargaining contract to which one was bound before employees begin working for another. However, they do dispute that the interrelation among them had been so great that they all constituted mere separate arms or components of a single-integrated enterprise, much less alter egos.

Only if the three entities' position, that there is no interrelation, is concluded to be correct does the second alternative allegation come into play. It focuses exclusively on the closed entity and its bargaining with the Union for a closing agreement — one that would wind up its obligations to the Union and the medical laboratory technologists whom it represented when working for the closed entity. There is no dispute about the fact that such bargaining commenced prior to the closure. Nor is it disputed that the bargaining continued after the closure. In fact, impasse was not reached until over a month after the closure and resultant termina-

tion of all employees whom the Union had been representing.

*7 During those closing negotiations the closed entity made certain proposals that, in effect, would relieve other entities of liability arising from its relationship with the Union. The General Counsel and the Union argue that such proposals pertain to a subject not encompassed by Section 8(d) of the Act and, consequently, are not ones concerning which a party may bargain lawfully to impasse. Since the closed entity did so, it is alleged alternatively, bargaining to impasse about such proposals violated Section 8(a)(5) and (1) of the Act. That entity argues, however, that the subject of those proposals is one that is encompassed by Section 8(d) of the Act and, even if that is not so, that those proposals did not cause an impasse, but merely had been part of a proposal rejected by the Union on the basis of other unrelated subjects that are indisputably encompassed by Section 8(d) of the Act. Inasmuch as I conclude that there is merit to the General Counsel's first alternative allegation, I make no finding regarding this second alternative allegation and will dismiss it.

Under the Act there is a single-employer relationship whenever "nominally separate entities are actually part of a single-integrated enterprise so that, for all purposes . . . there is in fact only a 'single employer.' " (Citation omitted.) Geo V. Hamilton, Inc., 289 NLRB 1335 fn. 2 (1988). That is, whenever there is an absence of the "arm's length relationship found among unintegrated companies." Operating Engineers Local 627 v. NLRB, 518 F.2d 1040, 1045-1046 (D.C.Cir.1975), affd. on this issue sub nom. South Prairie Construction Co. v. Operating Engineers Local 627, 425 U.S. 800 (1976). To assess whether or not a single-employer relationship exists, analysis focuses on four aspects of ostensibly separate entities, seeking to ascertain whether there is interrelationship of their operations, whether there is common management of them, whether there is centralized control of their labor relations, and whether there is common ownership or financial control of them. See Radio & Television Union Local 1264 v. Broadcast Service of Mobile, 380 U.S. 255, 256-257 (1965); Sakrete, Inc. v. NLRB,

332 F.2d 902, 905 (9th Cir.1964), cert. denied 379 U.S. 961 (1965).

For the reasons set forth in section II, infra, I reach the following three conclusions. First, a preponderance of the evidence, viewed in its entirety, establishes existence of a sufficient interrelationship among the three entities, in the totality of those four aspects, to conclude that they constituted a single employing entity and, concomitantly, a single employer. Second, in view of the unit's reduced scope following the hospital's employment of medical laboratory technologists — and employment of them only at its campuses where, by themselves, they do not constitute one of the bargaining units specified as appropriate by the Board's Rules — I conclude that in light of a changed circumstance of that magnitude, no affirmative bargaining order can issue for a unit confined to them. Third, inasmuch as the technologists' employment change occurred during a collective-bargaining contract's term, and in light of the fact that continued representative status may not be challenged during the term of a contract, I conclude that failure of the single employer to continue honoring the contract until its expiration did violate Section 8(a)(5) and (1) of the Act.

*8 Those conclusions dictate resolution of the two remaining allegations of the complaint. There is no evidence of a disguised continuance by the hospital of the closed entity's operations after mid-June. Nor is there evidence that the closure and limited resumption of laboratory operations by the hospital had been intended to eliminate the Union as the bargaining agent of medical laboratory technologists. Still, even if there were a basis for concluding that an alter ego relationship were to exist, the postclosure change in the unit's scope represents so dramatic a change that the factor of bargaining history cannot overcome the unit's lack of continued appropriateness, in light of the public policy underlying enumeration of acute care hospital units in the Board's Rules. Therefore, I dismiss the alter ego allegation.

The alternative allegation, limited to the closed entity, is contingent on a conclusion that no single-employer relation-

ship existed. I conclude that it did. Accordingly, the predicate for addressing and resolving the alternative allegation does not exist and I dismiss it, as well.

B. The Three Entities Respondent and Laboratory Testing

In the preceding subsection reference is made to a closed entity, an acute care hospital which took over a portion of the closed entity's operations, and a third entity, a holding company, with interests in the other two entities. To fill in those blanks, what has been referred to as the closed entity is Pathology Institute, Inc. (Respondent PI). The acute care hospital which took over some operations is Alta Bates Medical Center (Respondent ABMC). The third entity is Alta Bates Corporation (Respondent ABC). If this case's first alternative allegation could be evaluated solely on the basis of mid-June events, it would be a simple matter to move on after briefly describing each of the three entities, as well as the particular operations involved in this proceeding. However, some background must be covered to shed light on their relationship and to put in context certain events that occurred.

Existing at all material times in its current organizational form has been Respondent ABC. It is, and has been, a California nonprofit public benefit corporation since 1980 when its Articles of Incorporation (R.ABC Exhs. 10(i)(m)) were filed. To the extent pertinent here, its purposes have been to further advancement of health care, to coordinate through, inter alia, "long-range planning and fund raising" the operations of nonprofit hospital and other related health care organizations, and to assist community health care organizations in providing their services. Since at least January, according to its amended and restated Articles of Incorporation (R.ABC Exhs. 10(a)-(c)) filed during that month with the California secretary of state, its sole member — the term parallel in the not-for-profit world to shareholder in the for-profit world — has been "California Healthcare System, a California nonprofit public benefit corporation."

*9 Since 1980 Respondent ABC has held shareholder interests in a few for-profit entities and membership interests in a much greater number of not-for-profit entities. In addition to those essentially holding company activities, Respondent ABC also sells various support services to the entities in which it holds, or has held, shareholder or membership interests.

Like Respondent ABC, Respondent ABMC is a California nonprofit public benefit corporation. It is not altogether clear when it had been originally formed and incorporated. However, what is significant to this proceeding is that during 1992 it had two classes of members: Respondent ABC and, second, the Alta Bates Community Member. The latter, according to article III of Respondent ABMC's amended and restated bylaws (R.ABC Exhs. 8(d)-(e)), "shall have 200 associates" which are "divided into two (2) groups." One of those groups — designated "Professional Associates" — consists of "one hundred twenty (120) associates selected by and from the Active Medical Staff of [Resp[ondent ABMC]." The other — designated "Trustee Associates" — is composed of eighty (80) associates selected by the Board of Trustees of [Respondent ABMC] from among the members of said Board of Trustees and the members of the Boards of Trustees, Boards of Directors, or any honorary, advisory or consulting boards of this corporation, any Operating Corporation, or from among the community served by [Respondent ABMC].

Each of the two members can exercise one vote in membership meetings.

Since the beginning of 1992 Respondent AMBC has operated two hospitals — the Ashby Campus and the Herrick Campus — in Berkeley, California. However, it did not always do so. For almost the entire 20th century prior to 1984 each campus had been owned and operated separately by competitors: one as Alta Bates Hospital; the other as Herrick Hospital and Health Center. In July 1984 the two hospitals were affiliated under the holding company Acute Care Affiliates. It, according to an overview prepared by Respondent PI in 1988 (R.PI Exh. 69), had been

"[e]stablished in 1984 as the parent of the acute care hospitals in the Alta Bates health system." Management of the two hospitals continued to be conducted separately. But, to achieve economies, they began combining some services previously conducted separately. As described below, one of those services was clinical laboratory testing.

Acute Care Affiliates went out of existence when the two affiliated hospitals merged effective March 14, 1998. (R.ABC Exh. 9(a).) That merged entity was known as Alta Bates-Herrick Hospital (AB-H). Article VI of its Articles of Incorporation provided that if AB-H were to "be dissolved or wound up at any time, then all of the properties, monies and assets of this corporation shall be transferred exclusively to and become the property of [Respondent] ABC." That never happened. But in 1992 AB-H was succeeded as operator of the two hospital campuses by Respondent ABMC. No evidence was presented regarding the reason(s) for that change. The significant point about it, however, is that only a name change occurred. No modification or alteration of operations of those two campuses resulted from it.

*10 Before focusing on Respondent PI it must be understood that medical laboratory technologists perform laboratory testing. That is the work involved in this proceeding. To the extent significant here, it consists of essentially two types. One is clinical testing. It involves relatively routine work that can be performed in the ordinary course, and had been performed prior to 1986, by personnel in acute care hospitals. Clinical testing encompasses work that must be performed immediately — STAT — in rapid response fashion and, as well, other types of clinical testing that do not require such immediacy of results. A second type of testing is called reference testing. It is more complex. Given that complexity and the infrequency of specific tests, hospitals and physicians' offices do not ordinarily spend the money to acquire equipment needed for the many types of complex testing that can be conducted. Rather, they usually dispatch — "refer" — specimens for testing to laboratories which can justify purchasing the necessary equipment because they receive specimens from a multiplicity of sources.

Prior to their above-described July 1984 affiliation, Alta Bates Hospital and, as well, Herrick Hospital and Health Center each operated its own clinical laboratory. In addition, there was a reference laboratory maintained in Berkeley by Pathology Institute. It was an entity distinct from Respondent PI and was controlled and operated by the entity Alta Bates Ambulatory Health Service (ABAHS). ABAHS was a corporation established as a separate division of Respondent ABC to provide ambulatory services. One of those services was the laboratory testing offered through Pathology Institute.

As described above, after the two hospitals affiliated in July 1984, they had commenced combining services to achieve economics. One area to which they looked had been their then-separately operated clinical laboratories. By the end of 1985 a decision had been reached to consolidate not only their own two laboratories, but also the reference laboratory then being operated through ABAHS by Pathology Institute. Ultimately that occurred during the spring of 1986 when Respondent PI was formed by amending articles of incorporation of Lazaroni Laboratories (R.PI Exh. 2), an entity acquired by ABAHS in 1982 which operated laboratories that were merged into Pathology Institute in May or June 1985. (G.C.Exh. 157.) Thereafter, until mid-June, Respondent PI performed all clinical and much of the reference laboratory testing for the two hospital campuses.

From inception Respondent PI had been a for-profit entity. Initially, its shares were held by Respondent ABC (50 percent), Alta Bates Hospital (35 percent) and Herrick Hospital and Health Center (15 percent). Over time that changed, with the result that by mid-June Respondent ABC and Respondent ABMC each held 48 percent of Respondent PI's shares. The remaining four percent had been acquired by Heals Individual Practice Association, an entity unrelated to the Respondents. When Respondent PI closed in mid-June Heals was cashed out, leaving Respondents ABC and ABMC each holding half of Respondent PI's total shares.

*11 As set forth in the minutes of a special joint meeting of the executive committees of Respondent ABC and Respondent ABMC on April 16 (G.C.Exh. 49, p. 2), Respondent ABC's "reason for being in the laboratory business [was] to reduce the cost of laboratory services for [Respondent] ABMC [and the preceding hospital operators] and increase the service to physicians." Toward that end, Respondent PI conducted rapid response clinical testing at the STAT or rapid response laboratories in what had become known as the Ashby and Herrick hospital campuses of AB-H. All other clinical testing, as well as reference testing, was performed for the two campuses at Respondent PI's main laboratory in Berkeley at 2920 Telegraph Avenue.

In addition, it was intended that Respondent PI would attempt to generate revenues by selling testing services to other health care institutions, health maintenance organizations, and physicians. By April 1992 it had acquired approximately 800 physician clients and was providing reference testing to over 40 hospitals. Furthermore, it had opened draw stations or satellite laboratories in a number of locations outside of Berkeley. But it was a financial failure and it closed in mid-June.

Two final subjects are most logically covered in this subsection. First, the answers in this proceeding disputed the complaint's jurisdictional allegations. But Respondents' briefs disclose that there is no dispute that each of the Respondents are employers engaged in commerce and in businesses affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. The problem arose from the fact that the complaint pled the jurisdictional conclusion on the basis of all Respondents as a single employer, rather than separately. Inasmuch as they denied single-employer status, each Respondent denied that conclusion.

They admitted, however, that during the 12-month period preceding issuance of the complaint, Respondent ABMC derived gross revenues in excess of $250,000 and, further, purchased and received goods valued in excess of $5,000 which originated outside the State of California. They also admitted that during calendar year 1992 Respondent PI

provided services valued in excess of $50,000 directly to Respondent ABMC. No description was afforded in the complaint of Respondent ABC's dollar amounts that would serve to show either legal or discretionary jurisdiction over it. But since I conclude that the evidence is sufficient to establish that Respondents had been a single employer during the period preceding issuance of the complaint, I conclude that, based on the jurisdiction pled and admitted with regard to Respondents ABMC and PI, there is a basis for concluding that at all material times Respondents had been a single-integrated enterprise engaged in commerce and in business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Second, throughout the period encompassed by the above-described evolution of entities, the Union had been the bargaining agent of medical laboratory technologists employed in each of the two hospitals and, in a separate unit, by Pathology Institute. After the 1986 laboratory consolidation the Union continued as their bargaining agent in a single, employerwide unit of all medical laboratory technologists employed by Respondent PI. Successive collective-bargaining contracts were negotiated and executed. The most recent one — and the one in effect at the time of Respondent PI's closure — had a stated effective term of February 1, 1991, to October 31, 1993. Article I described the bargaining unit as "all Medical Laboratory Technologists employed by the Employer." It specifically excluded from the unit the classifications of "phlebotomists, laboratory aides, laboratory assistants, blood gas technicians, histology technicians, histologists, cytology technologists, dieners, office clerical employees, managerial employees, other professional employees, confidential employees, guards and supervisors as defined by the [Act]."

C. Closure of Respondent PI

*12 Unrealized went Respondent ABC's 1986 expectations that Respondent PI would become a profitable entity. It never earned a profit. It went into debt. Furthermore, it never was able to provide clinical testing to AB-H and, then, to Respondent ABMC at rates lower than the hospitals

could perform by employing their own personnel to conduct that testing. As a result, Respondent PI was abandoned by Respondents ABC and ABMC.

Paul Sohmer had served as Respondent PI's chief executive officer and president from May 1986 until February 1991, when he resigned from those two positions. Inability to locate a satisfactory person to replace Sohmer led Robert L. Montgomery, Respondent ABC's chief executive officer and president, to ask Robert Reed, Respondent ABC's chief financial officer, to serve as acting chief executive officer and interim president of Respondent PI. As Respondent ABC's chief financial officer Reed is responsible "for the strategic, financial and capital planning of the Alta Bates system," he testified.

Reed began serving as Respondent PI's acting chief executive officer and interim president in April 1991. His service in those capacities had been intended to be merely a temporary arrangement until a permanent chief executive officer and president could be located. There is evidence of an ongoing effort to do so. Nonetheless, apparently Respondent PI's precarious financial situation dissuaded anyone who might be considered qualified from applying. As a result, Reed continued to serve as Respondent PI's acting chief executive officer and interim president until its closure and, also, he has continued to serve as Respondent ABC's chief financial officer, as well.

Prices for testing provided by Respondent PI to AB-H were negotiated annually. AB-H never refused to continue having its laboratory testing performed by Respondent PI. However, there were ongoing expressions by AB-H's officials that they believed it was paying more than it should for that service; that it could perform at a lower cost at least clinical testing with its own employees. As Reed explained, "There were considerable disputes," and "the basis of the price was renegotiated on several occasions trying to accommodate the difference in opinion, if you will, of what was a fair price for the services being rendered."

During May 1990 Albert Greene succeeded Paul Hofmann as chief executive officer and president of AB-H. In

the course of reviewing that entity's cost structure he discovered that AB-H was being charged by Respondent PI more than the price that Greene regarded as appropriate for acute care hospitals. He discussed his opinion with Sohmer and, ultimately, retained an independent agency — World-Wide Health Care Consulting — to evaluate the cost to AB-H of Respondent PI's laboratory testing services.

Its survey concluded, to the extent pertinent, that AB-H was incurring a higher testing cost than it would incur if it conducted its own clinical testing. (R.ABC Exhs. 38(c), (e)-(o).) By the time World-Wide's written survey had been submitted, Sohmer had been replaced by Reed. The latter disputed the survey's conclusions, challenging aspects of the premises underlying them. Nevertheless, in the course of proposing a price negotiation during July of 1991, Reed pointed out in a memo to AB-H that, "In the next several weeks, we will present a proposal to transfer ownership of AB-H's lab to AB-H and have [Respondent] PI provide management and reference services." (G.C.Exhs. 24(g) and (h).)

*13 The consequences of that summer negotiation did not solve Respondent PI's financial difficulties. During 1991 it lost $1,425,000. By the end of that year it was seeking an additional testing charge of $800,000 in 1992 from what would become Respondent ABMC. Upon learning of that proposed increase Greene objected strenuously. During a meeting with him in December 1991, Reed agreed to another survey — this time conducted by Arthur Anderson & Co., which also served as auditor for ali three Respondents — in return for Green's agreement to an interim increase amounting to $100,000.

That interim agreement did not resolve Respondent PI's financial difficulties. As Reed explained, "based on the fact that the major customer being [Respondent ABMC] wouldn't agree to the pricing structure put forth a revised budget. But unfortunately the revised budget called for a loss," taking into account the $100,000 increase, in the amount of $447,000 for 1992. As it turned out, an amount of even that magnitude proved optimistic. For Respondent PI

incurred a loss in excess of that amount during just the first calendar quarter of that year. Nor was Respondent PI helped by the costing study of Arthur Anderson & Co. (G.C.Exh. 13.) It concluded that Respondent ABMC "could operate the laboratory at a lower cost than that charged by [Respondent PI]." Yet, it also was observed in the study that Respondent "ABMC's laboratory costs at [Respondent] PI's current charge are not unreasonable when compared to other hospitals' laboratory costs."

Respondent PI's demise was sealed by the costing study's results and by the magnitude of its 1992 first quarter loss. Not only was Greene unwilling to agree to any further price increases, but he demanded that Respondent PI either lower its price or Respondent ABMC would have "no choice but to either perform the laboratory services itself or to find another third party to conduct and manage laboratory operations for [it]." This left Respondent PI in the position of, as Reed characterized it, "total meltdown." For, explained Reed, other hospitals might question why they should continue purchasing testing from Respondent PI when a major shareholder was no longer willing to do so. Respondent ABC and Respondent ABMC did not view the situation differently.

At a special joint meeting conducted on April 16 their executive committees reviewed the reason for Respondent ABC's involvement in laboratory business. During a discussion of that subject, according to that meetings minutes (G.C.Exh. 49), it was pointed out that Respondent "PI and its drawing stations were founded to provide the level of services expected by the Alta Bates medical staff." A representative of Arthur Anderson & Co. observed during that meeting that if Respondent ABMC were to begin operating the clinical laboratory, Respondent "ABMC and [Respondent] ABC would not be required to further subsidize [Respondent] PI operations at the current rate of $1.5 million to $2.0 million per year." In consequence, voting separately, each executive committee resolved to:

*14 request that the Board of Directors of [Respondent PI] take all action necessary to protect the interests and

rights of the shareholders of [Respondent PI], to maximize the value of all shareholders' investments, and to that end to consider all options for [Respondent PI] that are inherently fair to the shareholders of [Respondent PI] and will serve the best interests of [Respondent PI] and its shareholders.

Yet, the seemingly broad latitude accorded Respondent PI by the general wording of those identical resolutions was, in reality, not an accurate reflection of the actual decision made that day by the two executive committees.

Greene testified at two points during the hearing concerning the April 16 special joint meeting. On the second occasion, when appearing as a witness for Respondents ABC and ABMC, he testified that sale of Respondent PI had been only one of the options discussed at the special joint meeting. Still, testifying earlier about that meeting, when called as a witness by the General Counsel, Greene was asked the following questions and responded as follows:

Q. Mr. Eggleston: Now, was there a discussion of the sale of [Respondent PI] at this meeting:

A. Dr. Greene: Yes.

Q. Mr. Eggleston: And what was the conclusion with respect to the sale?

A. Dr. Greene: That [Respondent PI] should be sold.

That a firm sale decision, in fact, had been reached at the special joint meeting tends to be further confirmed by the speed with which Respondent PI made its decision to sell out and close. That decision was made at a meeting of its board of directors on April 22, a mere 6 days after the special joint meeting. The minutes of that meeting (G.C.Exh. 14) disclose that Respondent PI's board concluded that "it must expeditiously pursue a sale of assets and/or sale of stock and potential, liquidation and dissolution of [Respondent] PI," and that it resolved to, inter alia, "Expeditiously commence the process of sale of [Respondent] PI on terms and conditions that are inherently fair to the shareholders of [Respondent] PI and will serve the best

interests of [Respondent] PI and its shareholders[.]" Respondent PI's management was directed to select a broker to prepare a Request for Proposal (RFP) to analyze the responses received to it from prospective buyers, and to appoint a special committee to select a buyer and to negotiate favorable terms with it for sale.

An RFP (G.C.Exh. 20) was prepared and disseminated. It specified that submissions should be made "by no later than 2 p.m., PDT, May 13, 1992." It excluded from sale, "The management contract with [Respondent] ABMC and two patient service centers located within [its] two hospital campuses." As to them, by letter to Reed from Greene dated April 28 (G.C.Exh. 122), Respondent ABMJC gave notice "of its intent to terminate the management contract between [Respondent] ABMC and [Respondent] PI effective on or about June 26," and, further, that Respondent ABMC was evaluating "independently providing clinical laboratory services for its inpatients and outpatients." In light of that evaluation, the letter continues, Respondent PI was requested to "immediately enter negotiations . . . for [Respondent] ABMC's purchase of the fixed assets presently owned by [Respondent] PI that are present and in use at both of [Respondent] ABMC's hospital locations and in-house drawing stations," and, moreover, that Respondent "ABMC would be taking back its leased space within [Respondent] ABMC where [Respondent] PI presently conducts management services for the hospital, and would expect [Respondent] PI to vacate same on or about June 26, 1992."

*15 Meris Laboratories, Inc. was the bidder selected for purchase of the non-Respondent ABMC-related assets of Respondent PI. There is no contention that Meris engaged in any unfair labor practice, nor that it had been involved in any supposed single-employer relationship with any of Respondents. It is interesting, however, that notwithstanding the May 13 deadline specified in the RFP for submissions, the asset purchase agreement (G.C.Exh. 150) between Meris and Respondent PI is "dated as of May 11, 1992[.]"

As to the portion of Respondent PI's business excluded from the RFP, Reed and Greene entered into an Asset Purchase Agreement (G.C.Exh. 151), "made on June 20, 1992," which conveyed those assets to Respondent ABMC. The agreement provided for closing on June 22. There is no contention that Respondent PI had not been paid fair market value for the assets sold under that agreement. In fact, their value had been appraised and set by an independent third source.

As it turned out the closing dates for the asset purchase agreements were advanced and Respondent PI closed a few days earlier than anticipated originally. But the evidence is not consistent as to the precise date on which Respondent PI actually ceased operating. Respondent ABMC notified the Alta Bates Medical Staff by memorandum (G.C.Exh. 135) dated June 19 that "the process by which [Respondent] ABMC assumes responsibility for the hospital lab and Meris assumes responsibility for outpatient testing is being accelerated and will begin on June 22nd." Still, by facsimile (G.C.Exh. 137) dated June 19 Respondent ABMC notified the Union "that, as of this date, [Respondent PI) no longer has a presence on [Respondent ABMC]'s premises. Effective today, [Respondent ABMC] has taken over operations of the laboratory."

Whatever the exact closing date of Respondent PI, however, it did cease all operations and, thereafter, continued in existence only as a shell for winding down all consequences from its closure. Heals Individual Practice Association's 4-percent ownership interest was cashed out, leaving Respondents ABC and ABMC each 50-percent shareholders in Respondent PI. Respondent ABMC commenced conducting clinical laboratory operations at its two hospital campuses. It did so by hiring some of the medical laboratory technologists employed previously by Respondent PI. In fact, there is no evidence that any of those initially hired technologists had been employed previously by anyone or by any entity other than by Respondent PI.

D. Negotiations Arising From the Closure

As set forth in subsection A, supra, the alternative allegation pertaining exclusively to Respondent PI's closure negotiations will be dismissed. Accordingly, it is unnecessary to describe those negotiations which resulted in impasse at the end of July, over a month after Respondent PI closed. However, in connection with my third primary conclusion set forth in that same subsection, it is necessary to briefly describe the negotiations that occurred between the Union and Respondent ABMC.

*16 After the Union learned of the closure it set out to negotiate an agreement for medical laboratory technologists who would be employed at the hospital campuses. Although it took the position that so confined a unit is not appropriate, Respondent ABMC was willing to enter negotiations concerning those employees to ascertain if acceptable terms for a contract could be reached. In fact, prior to the closure, tentative agreement was reached. But the employees declined to ratify it, leaving the parties with no agreement. Thereafter, Respondent ABMC instituted its own employment terms for those employees and refused to recognize the Union as their bargaining agent.

The General Counsel raises no objection to the mechanics and procedures of those negotiations. Instead, relying on the 16½ months then still remaining on the 1991-1993 collective-bargaining contract, the General Counsel alleges that there had been a failure and refusal "to apply [that contract] to [medical laboratory technologists] working at the [Respondent] ABMC Laboratory."

There is no evidence that the postclosure status of the then-existing contract had been discussed during the May and June negotiations concerning those employees. Obviously, the parties merely assumed that any successfully negotiated contract would supplant the existing one. Nevertheless, there is no evidence that the Union ever stated that it was abandoning that contract and its terms. To the contrary, among the allegations of the amended charge in Case 32-CA-12599-1 — filed on September 9, slightly less than 3 months after the closure — was one asserting that

Respondents ABC and ABMC "have refused to honor and comply with the terms of the existing Collective Bargaining Agreement between Local 29 and the employer."

II. DISCUSSION

The issue of single-employer relationship is a mixed one of mostly fact and some law. There is no dispute concerning most of the facts underlying that issue in this case. Accordingly, rather than bifurcate consideration of it — reciting the facts in one section and, then, summarily repeating them elsewhere as part of analysis — the better approach would appear to be simply to recite how particular undisputed facts support conclusions that I reach in each of the four aspects of single-employer analysis enumerated in subsection I, A, supra.

A. Common Ownership or Financial Control

It is argued that this aspect of single-employer analysis is inapplicable to nonprofit entities because they have no literal owners. But that is not a convincing argument. It is accurate that there are no owners of Respondents ABC and ABMC. Instead, they are operated by "members." Still, that term is the parallel one in the nonprofit area for the term "shareholder" in the for-profit area. Single employer analysis developed in an era before the Board's jurisdiction expanded to embrace health care institutions and, in all instances, nonprofit enterprises. Consequently, use of the term "owner" was never intended in that analysis to preclude comparisons involving persons or entities operating nonprofit entities. Rather, it appropriately is applied to whomever controls the operational and financial destiny of an entity or entities being scrutinized.

*17 There are two members of Respondent ABMC, as described in subsection I, B, supra. Respondent ABC is one of them. Since each member can exercise but one vote, at first blush it might appear that it cannot truly be said that Respondent ABC is able to exercise control over Respondent ABMC. To some extent, as a literal matter, that is true of any less than 51-percent member or shareholder. Yet, the

fact is that one need not own a 51-percent interest in an entity to control it in reality. So, too, here. Because each of Respondent ABMC's members has a single vote, both must agree for it to proceed with any action requiring a decision by its members. That is, like a vehicle drawn by a team of two horses, both must pull in the same direction and at the same pace for the vehicle to proceed. In consequence, each horse does control the vehicle's direction and pace. If one refuses to cooperate with its mate, it can effectively prevent the vehicle from proceeding. That is the fact with Respondent ABMC, as well. So long as Respondent ABC declines to vote as does the Alta Bates Community Member it can preclude action by Respondent ABMC. In that manner, Respondent ABC exercises control in a negative fashion. Further, in the circumstances presented here, Respondent ABC alone can, in fact, exercise significant, though limited, affirmative control over Respondent ABMC.

As described in subsection C, infra, Respondent ABC possesses a number of reserved powers over Respondent ABMC that can be exercised solely at the former's discretion — without regard to the position of the community member. Further, among other powers reserved to Respondent ABC by the amended and restated bylaws of Respondent ABMC is sole "authority to initiate policy for [Respondent ABMC] where such policy involves coordination of the activities of [Respondent ABMC] with . . . (a) any other corporation of which [Respondent] ABC is also the corporate member." (R.ABC Exhs. 8(mm)-(nn).) Moreover, under article VI of the Articles of Incorporation of AB-H — the entity supplanted by Respondent ABMC through no more than a name change which, according to Respondents' witnesses, caused no substantive change in the underlying entity — "In the event [Respondent ABMC] shall be dissolved or wound up at any time, then all of the properties, monies and assets of [Respondent ABMC] shall be transferred exclusively to and become the property of" Respondent ABC. (R.ABC Exhs. 9(d)-(e).) Given the foregoing facts, while Respondent ABC could possess greater financial interest in and control over Respon-

dent ABMC, it does possess substantial control over it and its operations.

Of course, Respondents ABC and ABMC have been virtually the sole shareholders of Respondent PI throughout its existence. The 4 percent of its shares held by Heals until mid-June is a relatively insignificant amount. Moreover, there is no evidence that Heals ever participated in, or was even consulted concerning, operations of Respondent PI. As described in subsection I,B, supra, one purpose for Respondent PI's formation had been to facilitate hospital operations of AB-H. Further, the closure decision made at the April 16 special joint meeting took place without, so far as the record discloses, any participation of Heals or input from it. Therefore, in reality, Respondents ABC and ABMC possess ownership of Respondent PI to the same degree as does any parent over its wholly owned subsidiary.

B. Interrelationship of Operations

*18 A number of factors demonstrate existence of interrelationship of operations among Respondents. First, as to their overall purpose, one of the "specific and primary purpose[s]" of Respondent ABMC — and of AB-H before it — is "[t]o establish, equip and maintain one or more nonprofit hospitals." (R.ABC Exh. 9(b).) That purpose was, and is, accomplished at the Ashby and Herrick campuses. Among Respondent ABC's "specific and primary purposes" are coordination of "activities of an operating nonprofit hospital or hospitals and other related organizations engaged in health care activities" and, also, "to otherwise assist such organizations in the performance of their activities." (R.ABC Exh. 10(a).) Those purposes are accomplished to a significant degree through Respondent ABC's relationship with Respondent ABMC and the hospital campuses operated by it.

Clinical and reference laboratory testing is necessary to conduct hospital operations. After its formation, Respondent PI had begun operating rapid response laboratories in Alta Bates Hospital and in Herrick Hospital and Health Center. Those were operations previously conducted by personnel of

those two hospitals. Although Respondent PI had acquired an extensive clientele by 1992, Respondent ABMC remained its primary client — as Reed characterized it, "the principal customer" — generating approximately 40 percent of Respondent PI's revenue. By comparison, it was estimated that the next largest customer had been generating only approximately 12 percent of Respondent PI's revenues. Indeed, so crucial was Respondent ABMC's business to Respondent PI that the latter was left with no alternative but to close after Respondents ABC and ABMC decided to discontinue the latter's laboratory testing business with Respondent PI.

Second, Respondent ABC provided two classes of services to Respondents ABMC and PI. As Robert Montgomery, Respondent ABC's chief executive officer and president, explained, "[W]e have core services and, then, we have purchase services." Since 1988 the latter category embraced liability insurance, purchasing, auditor selection and fee negotiation, some employee benefit purchasing, and "cash forecasting and cash management." (R.ABC Exh. 11(e).) Respondent ABC's affiliates are free to purchase them or not to do so. In fact, Respondents ABMC and PI chose to do so. That they availed themselves of those services from Respondent ABC is some evidence of interrelationship of operations.

That both purchasing Respondents could have opted not to buy Respondent ABC's purchase services is not a significant consideration. For, it is the existence of interrelated operations, not a compulsion to be interrelated, that is the material consideration. Consequently, the fact that Respondents ABMC and PI obtained those services from Respondent ABC, rather than to obtain them elsewhere or to employ their own personnel to provide them, is the significant consideration.

Beyond that, there was no element of discretion concerning the "core services." Montgomery described them as "a basic service, just, generally, for all kinds of support services." Reed, Respondent ABC's chief financial officer — and, as well, the acting chief executive officer and interim

president for Respondent PI for over a year before its closure — described core services as "generally, strategic planning that's provided by" Respondent ABC, for a fee based upon "the sum total of all salaries for officers of [Respondent ABC] . . . passed, as what we called overhead before, to each of the affiliates through a calculation which becomes the core fee." Affiliates, such as Respondents ABMC and PI, have no choice about paying the fees assessed by Respondent ABC for core services provided by the latter. As Reed acknowledged, that fee, which is based on each affiliate's size and capital, is "not a fee-for-service type arrangement."

*19 Third, the perhaps most significant purchase service involves the sale of financial services. Respondent ABC has established a cash pool fund which witnesses analogized to a mutual fund. For one aspect of the cash pool that analogy is apt. Excess revenues of participating affiliates are pooled and, then, invested in financial instruments of governmental and nonprofit entities, thereby achieving from pooling better investments at a lower cost. Both Respondent ABMC and Respondent PI participated and, to that extent, engaged in a common endeavor with Respondent ABC, as well as with each other.

The pool also provides an added advantage to those two affiliates of Respondent ABC. In a file memorandum (G.C.Exh. 80) prepared by Respondent ABC's assistant treasurer, Keith Ian Dickinson, who manages the cash pool, the pool's operation is described. While dated December 18 there is no evidence that it did not accurately portray how the pool had been operating at all times during its existence. In fact, Dickinson agreed that the memorandum correctly summarizes or explains how the cash pool works. It recites that there are three "Components and Uses of the Pooled Funds": (1) setting aside a "balance equal to one payroll, including taxes . . . for working capital needs"; (2) "[p]ooled funds are available for short-term intercompany loans"; and, (3) "[t]he remaining balance is set aside for capital projects as approved through the budgeting process by the Board of Trustees."

As to that third item, Dickinson testified "the Board of Trustees" mentioned in it "refers to the funded depreciation account that is established by the Board of Trustees of [Respondent ABMC] for purchases of capital equipment." Thus, while the cash pool was established and is operated by Respondent ABC, Respondent ABMC plays a primary role in operation of a significant aspect of it: disposition of some of its funds. Further, Dickinson agreed that "this restricted depreciation account is limited to" Respondent ABMC. Other cash pool participants, who can only be affiliates of Respondent ABC, do not enjoy access to the restricted depreciation account for use on their own capital projects. Accordingly, although Respondent ABMC's participation in the pool may be literally discretionary, given its exclusive access to those funds, as well as complete discretion which its board of trustees possesses to determine their use, Respondent ABMC would have every reason to participate, and to continue participating, in the arrangement established and maintained by Respondent ABC.

That is no less true of Respondent PI, though for a different reason. As described in subsection I, C, supra, it had never been a financial success. The cash pool had provided a mechanism through which it could secure loans from the pool, as described in item two of Dickinson's memorandum. In practice, originally affiliates were allowed to overdraw their pool accounts, thereby obtaining, in effect, short-term loans from other affiliate pool members. Respondent ABC eventually put an end to that practice by disallowing it. Thereafter, however, pool officials aided pool members in obtaining loans from banks and other affiliates whenever cash shortages arose. As a result, pool participation continued to aid affiliates in financial straits.

*20 As it turned out, that assistance benefited only Respondent PI. Dickinson testified that it had been the only affiliate encountering cash difficulties. Indeed, by at least 1990 Respondent PI's financial situation was so precarious that it could no longer attract bank loans. Its ability to secure borrowed funds had become dependent solely upon the willingness of Respondent ABC and its other affiliates to extend loans to Respondent PI through the cash pool's

auspices. Accordingly, although it was not obliged to remain a pool member, as a practical matter Respondent PI's ongoing need for borrowed funds bound it to continued participation in the cash pool.

In fact, during 1989 AB-H extended to Respondent PI a revolving line of credit in the amount of $1.1 million, due and payable on December 21, 1990. Not only was that loan not repaid by that date — and, in consequence, extended — but in 1990 AB-H extended an additional line of credit to Respondent PI in the amount of $500,000. Respondents ABC and ABMC assert that Respondent PI's accounts receivable had been the collateral for both loans. Yet that assertion is not supported by the testimony of Dickinson. After examining each of the promissory notes for the two loans, he testified that neither note imposed a collateral requirement, although he agreed that a collateral requirement would typically be recited in the body of such notes. It should be pointed out that these loans were not ultimately repaid until Respondent PI's closure. Thus, Respondent ABMC ultimately had succeeded AB-H as the creditor.

Fourth, Respondent PI was not the sole beneficiary of inter-entity loans from AB-H. By 1991, as a result of a series of transactions over time, Respondent ABC had received a total of $2.1 million in loans from AB-H. Reed testified that Respondent ABC had used its affiliates, funds, obtained through loans for which interest is paid, to start up businesses. He further testified that, historically, AB-H's funds, had been used by other affiliates to acquire assets and fund working capital. Respondents point out that it is not unusual for gifts — including ones made in the form of forgiveness of loan repayments — to be made among nonprofit entities. But, there is no evidence that Respondent ABC or any of its affiliates, including AB-H and Respondent ABMC, had made either loans or gifts to entities other than Respondent ABC and its affiliates. So far as the evidence shows, their loans and gifts were confined to the community of Respondent ABC and its affiliated entities.

Fifth, Respondent ABC had not been the sole entity to provide financial services to Respondent PI. According to

Dickinson, from June 1988 AB-H and Respondent ABMC had been paying Respondent PI's accounts payable from AB-H's and, then, Respondent ABMC's checking accounts. According to Dickinson, "the hospital was reimbursed for any expenditures made on behalf of [Respondent] PI through the cash pool." He characterized those payments as a "purchased service" — one which Respondent PI paid AB-H and Respondent ABMC to perform. However, the latter entities were health care providers which operated hospitals. So far as the record shows, neither one provided financial services to other entities in the ordinary course of their hospital operations. Providing financial services is the purpose for Respondent ABC's existence.

*21 At no point did Respondents provide any evidence to explain the reason(s) for, or circumstances under which, AB-H and, then, Respondent ABMC came to provide financial services to Respondent PI. Dickinson claimed that Respondent ABMC eventually ceased providing the accounts payable service to Respondent PI. But he was unable to recall when that had occurred. It obviously was a practice that had continued into February. For, in a memorandum (G.C.Exh. 33) to the chief financial officers of Respondent ABC and ABMC, Respondent PI's chief financial officer stated, "In addition, [Respondent] PI's disbursements are processed through the [Respondent] ABMC checking account and reimbursed through the case pool, creating a payable to [Respondent] ABMC."

Sixth, either in conjunction with or independent of the cash pool, Respondent PI maintained four accounts with Bank of America: general receipts, payroll, refund, and flexible benefits. Authorized to draw checks on those accounts are Respondent PI's chief executive officer and president and, as well, its chief financial officer. Yet, in addition, according to an account history for those accounts (G.C.Exh. 9), officials of both Respondent ABC and Respondent ABMC possess authority to sign checks on those accounts. For example, as of the time of Respondent PI's closure, Respondent ABC officials Montgomery Dickinson and Paul Lowe possessed that authority. So, too, did Reed. Though he had been Respondent PI's acting chief executive

officer and interim president since April 1991, he had acquired the power to draw checks on those accounts over a year before occupying those positions, in January 1990.

Also eligible to sign Respondent PI's checks for those accounts as of mid-June were Respondent ABMC officials Alan Fox and Dai Pham. Dickinson explained that authority to sign Respondent PI's checks had been given to officials of Respondents ABC and ABMC only to ensure that there would be someone able to sign checks should the designated Respondent PI officials be unavailable. Indeed, that explanation derives some support from a revised check-signing policy (G.C.Exh. 78) issued in March 1987. Nonetheless, of itself, the fact that officials of one entity possess authority to sign checks of another entity, even on a contingency basis, evidences something less than a detached relationship between them.

Seventh, ongoing transactions occur between affiliated entities of Respondent ABC, as illustrated by the laboratory services provided to Respondent ABMC by Respondent PI. The cost of those services are negotiated between the entities involved. But the results of those negotiations do not escape approval by Respondent ABC, even in instances when it is not furnishing or receiving any part of the service provided. In conjunction with annual budgets submitted by affiliated entities to Respondent ABC — a subject discussed further in subsection C, infra — each inter-entity transaction must be memorialized separately on a form bearing the title "BUDGET INTER-ENTITY TRANSACTION CONFIRMATION." (G.C.Exh. 62.) On those forms must be recited the details and prices of transactions which are memorialized by them. The forms must also be signed by the chief financial officers of both affiliates and, in addition, a space is provided for signature by Respondent ABC's "CFO/Controller[.]"

*22 Eighth, as chief financial officer of Respondent ABC, Reed testified that he becomes involved in negotiations between affiliates whenever they cannot agree on a price for an inter-entity transaction. He further testified that his participation in such situations is, "Based on the ownership

[by Respondent ABC]. Based on [his] personal persuasion," and that he possesses no authority to dictate a final price. Nevertheless, his involvement in pricing disagreements between affiliates, such as Respondents ABMC and PI, further evidences an interrelationship of operations between Respondent ABC and, on the other hand, affiliates such as Respondents ABMC and PI.

So, too, does the fact that Respondent ABC's chief executive officer and president, Montgomery, periodically intervened on behalf of Respondent PI "to help them sell their commercial laboratory business to other hospitals, and I might periodically, call a chief executive officer of another hospital, encourage them to take a look at . . . and receive a proposal from [Respondent PI]," he testified. Montgomery characterized that activity as merely an aspect of the core service provided by Respondent ABC. Nonetheless, it also constitutes involvement by Respondent ABC in the business of Respondent PI and, as such, further illustrated an interrelationship of the two entities' operations.

Of course the most graphic display of such interrelationship was the assignment of Respondent ABC's chief financial officer, Reed, to serve as Respondent PI's acting chief executive officer and interim president for over a year. To be sure, that occurred because no adequate permanent replacement for Sohmer could be located. Still, ongoing operation of Respondent PI in those acting and interim capacities benefited not only Respondent PI, but also its shareholders, who were mostly Respondents ABC and ABMC.

A series of other assertedly interrelationship indicia are pointed to by the General Counsel and the Union: retention of the same auditor, retention of the same law firms for various matters including labor relations, absence of a written lease for space occupied at AB-H and Respondent ABMC's premises by Respondent PI, despite the existence of written leases for spaces elsewhere that it utilized. No one of these factors is conclusive. Nor is any one of the preceding enumerated factors. Taken in their totality, however, they suffice to establish by a preponderance of the evidence

that there was an interrelationship of Respondents' operations at all material times.

It is perhaps a logical argument that many of the foregoing factors are characteristic of relations between truly independent entities — that to readily conclude interrelated operations exist is to risk too readily concluding that separate employers' relations are interrelated and that they constitute a single employer when, in fact, they do not. Yet, a threshold response to such an argument is that there was, as set forth above, a high degree of operational integration present here and that it extended through a broad array of contexts, collectively exceeding what might be expected of truly separate enterprises. Secondly, as set forth in subsection I, A, supra, the factor of interrelationship of operations is but one of four aspects scrutinized to ascertain if a single-employer relationship exists. Even where so extensive an operations inter-relationship as here exists, it will not alone confer single-employer status absent overlap in at least some of the other aspects analyzed.

C. Common Management

*23 Review of the cases shows that a multiplicity of factors can serve to demonstrate existence of common management. In this case, a number are present. First, at the shareholder and member level, in the cases of Respondent PI and Respondent ABMC respectively, Respondent ABC exercises significant owner and membership control. As set forth above, it is one the two voting members of Respondent ABMC. As discussed in subsection II, A, supra, that enables it to exercise control at least negatively over Respondent ABMC. Added powers which are reserved to Respondent ABC alone confer even greater management control by it over Respondent ABMC.

Under article IX of Respondent ABMC's amended and restated bylaws (R.ABC Exh. 8), both members must approve before Respondent ABMC's articles of incorporation can be amended or restated, before all or substantially all of its assets can be sold or transferred, and before it can be merged, consolidated or dissolved. However, Respondent

ABC, alone, possesses power of prior approval over bylaw amendment or restatement, appointment of an independent auditor, and approval of transactions by Respondent ABMC in which a trustee or officer of Respondent ABC has a material financial interest. (R.ABC Exhs. 8(jj)-(kk).)

Furthermore, so long as Respondent ABC retains Federal and state tax exempt status, Respondent ABMC, its officers and employees, "may [not] take any of the following actions without the prior approval of [Respondent] ABC"; "Approval of operating and capital budgets, both in the aggregate and by line item'" undertake aggregate borrowing "in excess of a dollar amount to be established by [Respondent] ABC from time to time," with separate categories for borrowing of 1 year or less and for that which exceeds 1 year in length; "Purchase, sale, lease, disposition, hypothecation, exchange, gift, pledge and encumbrance of any asset, real or personal, with a value in excess of a dollar amount to be established by [Respondent] ABC from time to time, not previously included in the capital budget"; and, "approval of unbudgeted expenditures in excess of dollar amounts to be established by [Respondent] ABC from time to time" and, also, "of major transactions or major policies of" Respondent ABMC. (R.ABC Exh. 8(mm).) In sum, despite the presence of the Alta Bates Community Member, Respondent ABC enjoys considerable independent power to manage significant aspects of Respondent AMBC.

As to Respondent PI, of course, Respondent ABC has been a 48-percent shareholder for most of its existence. So, also, has been Respondent ABMC. Collectively, they have been able to dictate its course and, indeed, its very existence. The latter was shown most graphically by the decision at the April 16 special joint meeting of their executive committees to, as admitted initially by Greene, sell Respondent PI. So far as the record shows, the Alta Bates Community Member was never even consulted about that decision.

*24 Second, the next level below ownership or membership is that of the boards of directors or trustees. Respondent ABMC's board of trustees consists of 16-18 members, at least half of whom must be members of the active medical

staff of Respondent ABMC. Those members and, also, the trustees-at-large are nominated by the Alta Bates Community Member. Still, the trustees-at-large are "elected by a vote of [Respondent] ABC at the annual meeting of [Respondent] ABC." (R.ABC Exh. 8(m).) Respondent ABC also possesses power to remove trustees "from office with or without cause" and, when that occurs, Respondent ABC elects the replacement trustee or trustees from persons nominated by the Alta Bates Community Member. (R.ABC Exhs. 8(o)-(p).)

In at least years most proximate to Respondent PI's closure there has been a considerable overlap of members between the board of directors of Respondent ABC and the board of trustees of Respondent ABMC. (G.C.Exhs. 160 and 161.) For example, during 1992 there were 18 members on each one's board. Eight individuals — Howard L. Blanchette, M.D.; Jan L. Booth; David L. Cutter; Robert K. Dolgoff, M.D.; Ronald A. Dritz, M.D.; Lawrence D. Fox; Robert L. Harris; and, Norman P. Moscow, M.D. — served on both boards during that year. Two other members of Respondent ABMC's board of trustees during 1992 had served on both boards during the preceding 2 years, 1991 and 1990: Thomas Schwartzburg and Robert J. Swanson, M.D. Significantly, the chairman of Respondent ABMC's board during 1992 — David L. Cutter — also had been a member of Respondent ABC's board of directors during that same year.

Overlap of the two boards' members was a characteristic of immediately preceding years when the hospital campuses were being operated under the name AB-H. Thus, throughout 1991 nine individuals — Blanchette, Booth, Cutter, Dritz, Harris, Alan Lifshay, M.D., Richard L. Oken, M.D., Schwartzburg, and Swanson — served both on AB-H's 18-member board of trustees and on Respondent ABC's 20-member board of directors. As would be the fact with Cutter in 1992, one of them — Oken — served also as chairman of AB-H's board. Furthermore, by the end of 1991 a majority of the latter consisted of members of Respondent ABC's board of directors. For, Norman P. Moscow, M.D.

was selected as a mid-year replacement for Peter Murphy, M.D.

During both 1990 and 1989 nine of AB-H's then-16 member board were also serving as members of Respondent ABC's board of directors: Blanchette, Booth, Cutter, O'Neil S. Dillon, M.D., Lifshay, Moscow, Oken, Swanson, and Schwartzburg in 1990, and, during 1989, Blanchette, Cutter, Dillon, Lifshay, John H. Norton III, M.D., Oken, Swanson, Schwartzburg, and Bernardt N. Thal, O.D. Moreover, during both of those years, as in 1991 and 1992, the chairman of AB-H's board of trustees had been a member of Respondent ABC's board of directors. As to the latter, AB-H's and, then, Respondent ABMC's chief executive officer, Greene, sat on it as an ex officio member. Though he had no vote, he testified that he had participated in the deliberations and discussions conducted by Respondent ABC's board members.

*25 With regard to Respondent PI's board of directors there is less evidence. The minutes (G.C.Exh. 14) of its April 22 meeting, when the decision had been made to sell out and close, identify 12 directors as present and do not list any directors as absent. One — Respondent ABMC's chief financial officer, Lawrence D. Fox — was serving also on the boards of both Respondent ABC and ABMC at that time. Another, Robert Aronno, was also serving as a member of Respondent ABC's board of directors during 1992.

Eight of the others had ties to either Respondent ABC or, more particularly, Respondent ABMC. Thus, the former's chief executive officer and president, Montgomery, was a member, as was Respondent ABMC's chief executive officer and president, Greene. Four members — Doctors David Miller, William Salyer, Oscar Scherer, and E. Gale Whiting — practiced at Respondent ABMC's campuses while serving on Respondent PI's board during 1992. In fact, through independent contractor arrangements, Scherer was medical director of Respondent ABMC's ventilator dependent unit and Salyer served as its director of anatomical pathology. Another board member was Paul E. Smith, an attorney who subsequently executed an asset purchase

agreement as "Attorney-in-fact" for Respondent ABMC. (G.C.Exh. 150, second p. numbered 42.)

Of course, those relationships to Respondents ABC and ABMC during 1992 may not be as crucial as the overriding fact that those individuals had been selected as directors by shareholders Respondent ABC and ABMC. For, those selections carry with them an inherent obligation to function in the best interests of Respondent PI's shareholders. Indeed, that obligation was voiced explicitly to Respondent PI's directors by Respondent ABC's and Respondent ABMC's executive committees during the April 16 special joint meeting, described in subsection I, C, supra. Further, Montgomery acknowledged that he had attended Respondent PI's board meetings "representing [Respondent ABC]'s interests and pathology interests in [Respondent PI] and [to] provide any . . . information that was appropriate as it related to other related organizations."

That is a point which is reinforced by the dual status of the eighth director with ties to Respondent ABC or Respondent ABMC. That is Reed. That he would be a member of Respondent PI's board in 1992 is not surprising inasmuch as he was serving as its acting chief executive officer and interim president. Nonetheless, for the entire period that he has done so, he has continued serving as Respondent ABC's chief financial officer. Consequently, his presence on Respondent PI's board of directors during 1992 — the year most pertinent to evaluation of the relationship among Respondents, given the fact that the alleged unfair labor practices occurred in June of that year — is a further indicia of common management.

So, too, are the identities of the four directors selected by Respondent PI's board to serve on the special committee to monitor preparation of the RFP and selection of a purchaser of Respondent PI's nonhospital assets. One was Chairman Oscar Scherer. The other three were Respondent ABC Director Aronno; Respondent ABMC Chief Financial Officer Fox, also a member of the boards of both Respondents ABC and ABMC; and E. Gale Whiting, who practiced at Respondent ABMC's campuses. If nothing else, the pres-

ence on that committee of particularly Aronno and Fox provided a means for ongoing management by Respondents ABC and ABMC of the process for selling those assets of Respondent PI.

*26 Third, the next lower level of management pertains to the officers of Respondents. For the most part separate individuals occupied those positions: Montgomery as chief executive officer and president of Respondent ABC since January 1990; Greene occupying those same offices for Respondent ABMC since May 1990, and Alan Fox had been its chief financial officer; and, Diane Dennis serving as chief financial officer for Respondent PI. None occupied an officer's position with either of the other two Respondents.

That also appears to have been the fact until April 1991 with respect to the chief executive officer and president of Respondent PI. Those offices had been occupied until then by Sohmer. But from April 1991 onward — during the period most proximate to Respondent PI's closure — they were occupied by Reed, Respondent ABC's chief financial officer. That is not an insignificant managerial overlap. As described in subsection I, C, supra, the chief financial officer of Respondent ABC is responsible, testified Reed, "for the strategic, financial and capital planning of the Alta Bates system." And as the titles imply, Respondent PI's chief executive officer and president is the highest policy-making official of Respondent PI.

No doubt that Reed's service in those offices had been intended as temporary. Yet, motivation is not an element of single-employer analysis; existence of that relation is not contingent upon entities' intent to become single employers nor, even, to establish common management. The crucial fact is that, for over a year before the mid-June closure, Reed occupied significant managerial authority for both Respondent PI and Respondent ABC. And he was not the only individual to do so. Karen Hern had been Respondent ABC's general counsel. By at least April 1 she also was serving in that same capacity for Respondent PI.

Fourth, existence of common management has not been confined by the cases to simple comparisons of tables of

directors and officers. Also scrutinized are institutional and operational control which may or may not exist. Here, as described above, Respondent ABC has reserved powers over Respondent ABMC, one of which applies to review of its annual budget "both in the aggregate and by line item[.]" Respondents' witnesses acknowledged that Respondent ABC possessed that same power over all of its affiliates, including Respondent PI. Greene testified that no revision of Respondent ABMC's budgets had been made by Respondent ABC during his tenure as chief executive officer and president. Of course, single-employer determinations focus more upon the existence "of overall control of critical matters at the policy level," *Sakrete of Northern California, Inc. v. NLRB*, 332 F.2d 902, 907 (9th Cir.1964), than upon ongoing actual exercise of such control. Even so, as to budgets annually submitted for Respondent ABC's review, its chief financial officer, Reed, acknowledged that there had been instances — though he characterized them as "rare" — when Respondent ABC had approved Respondent PI's budget subject to approval by the latter's board of revisions made by Respondent ABC. In such instances, agreed Reed, Respondent ABC had been exercising authority over Respondent PI's budget.

*27 Fifth, Greene denied that he was obliged to report to anyone at Respondent ABC, including Montgomery, regarding operations of Respondent ABMC. But that denial was contradicted by Montgomery. He testified that Greene "has a dual reporting relationship." One of its aspects, conceded Montgomery, was "to me as it relates to the relationships between [Respondent ABMC] and the other entities of [Respondent ABC] and, essentially, to meet the financial targets and the whatever financial obligations that [Respondent ABC] has with any of the other operating companies." Of course, Reed's dual status since April 1991 effectively accomplished that same purpose for Respondent ABC as regards Respondent PI.

Finally, Greene's initial admission, set forth in subsection I, C, supra, about the sale decision at the special joint meeting of executive committees cannot be disregarded. Power to continue or to terminate existence is power that

strikes to the core of managerial control over an entity. In view of the totality of the foregoing factors, I conclude that a preponderance of the evidence shows that common management of Respondents existed at all material times.

D. Centralized Control of Labor Relations

Although this factor is regarded as "the most important" one, *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1075 (1st Cir.1981), it must be remembered that "no one of the [four] factors is controlling . . . nor need all [of them] be present." (Citation omitted.) *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 384 (9th Cir.1979), cert. denied 444 U.S. 940 (1979). With specific regard to labor relations, it is not crucial that one of Respondent's officials did not directly oversee the work forces of the other two — did not review which employees were hired, fired, promoted, disciplined, etc. "In assessing the appropriateness of single-employer treatment, the fact that day-to-day labor matters are handled at the local level is not controlling," because the "more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries." *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1043 (8th Cir.1976).

From 1988 through its closure, Respondent PI's labor relations were handled directly by Director of Human Relations Beverly Chilton. She reported concerning those matters directly to Respondent PI's chief executive officer and president. Since April 1991 that had been Reed. He acknowledged that he "would have made the decisions" concerning Respondent PI's labor relations during the last 14 months before it closed. Indeed, he admitted having been the official responsible for Respondent PI's negotiations with the Union for a closing agreement. While he did not actually participate in the negotiations as they proceeded, he testified, Respondent PI's negotiators "would come back to me with progress [reports] or requesting latitude" changes in parameters that he had set for them. Inasmuch as Reed was concurrently serving as Respondent ABC's chief financial officer, his oversight role in those negotiations afforded

Respondent ABC a "means [for] exercis[ing] its clout in matters of labor negotiations by [Respondent PI]." Id.

*28 Reed contended that he did not report directly on those closing negotiations, nor on labor matters generally, to Respondent ABC. He testified that he, instead, reported directly to Respondent PI's board of directors. But of course, those directors are selected by and report to Respondent PI's shareholders, almost all of whom prior to the closure were Respondents ABC and ABMC. In fact, as set forth in subsection II,C, supra, almost all of those directors in 1992 had ties to one or the other of those two Respondents, and in one instance to both of them.

Reed also testified that in formulating positions on labor matters, "the parameters that are set for me are set through a budget, the global budget process." Of course, as also described in subsection II,C, supra, that budget process is subject to review by Respondent ABC which has the power, admittedly exercised occasionally, to make byline changes in it. Accordingly, in addition to Reed's dual role with Respondents ABC and PI, Respondent ABC possessed ability "to exercise its clout" over Respondent PI's labor relations through review of its budget and, in conjunction with Respondent ABMC, through the directors selected to serve on Respondent PI's board of directors.

As to labor relations of Respondent ABMC, since September 1991 they have been directly supervised by its vice president of human resources, Ruth Robinson. She reports to Greene. Although the evidence concerning the subject is quite sparse, it appears that he occupies the same role with respect to Respondent ABMC's labor relations as did Reed and, before him, Sohmer concerning those of Respondent PI. That is, Greene establishes the parameters for them and seeks approval and authority for his actions from Respondent ABMC's governing board. Yet, as set forth in subsection III,C, supra, the majority of Respondent AMBC's board of trustee members have been members and, in 1992, former members of Respondent ABC's board of directors. Through these common directors Respondent ABC possesses "the present and apparent means to exercise its clout"

in setting labor relations parameters for Greene, Robinson and other officials of Respondent ABMC. Nor is that its only vehicle for doing so.

As Montgomery conceded, reports must be made directly to him by Greene about subjects "relat[ing] to the relationships between [Respondent ABMC] and the other entities of" Respondent ABC and its affiliates. Obviously, that reporting requirement would naturally encompass any labor relations matter that might have an effect upon Respondent ABMC's relationship with other entities. Beyond that, as had Respondent PI, Respondent ABMC's budget must annually be submitted to Respondent ABC for approval and the latter possesses authority to make line-item changes in it.

One other aspect of this situation should not escape notice. Based on Greene's and Reed's descriptions, it appears that the chief executive officer and president of Respondents ABMC and, until it ceased dealing with the Union, PI had been the primary ongoing source of decisions concerning labor relations parameters for each one. Reed ended up doing that for Respondent PI because Montgomery had asked him to serve as its acting chief executive officer and interim president. In turn, according to Respondents, Montgomery had been able to make that request — and, in effect, appointment — of Reed incident to the core service provided to Respondent PI by Respondent ABC.

*29 Respondent ABC provides that same core service to Respondent ABMC. Consequently, should Greene resign or be removed, it appears that Respondent ABC would possess parallel authority to appoint Respondent ABMC's acting chief executive officer and interim president until a replacement for Greene was located. Of course, it might be assumed that any such appointment would merely be temporary, until a satisfactory permanent replacement could be located. Still, that had been the same assumption made when Sohmer had resigned those positions at Respondent PI. Consequently, it cannot be said with certainty that any acting and interim appointment at Respondent ABMC would, in fact, be of short duration. In any event, during

whatever period it lasted, such an interim and acting appointment would be made by Respondent ABC and, given the number of Respondent ABC-related members on Respondent ABMC's board of trustees, would last until, in effect, Respondent ABC was willing to agree to the person selected as a permanent replacement.

Obviously, there has not been an actual exercise of labor relations control here that is so extensive and intrusive as occurs, for example, when a single proprietor operates two interrelated small companies each of which employs but a handful of employs. Nevertheless, as pointed out above, satisfaction of this factor does not require micromanagement of each entity's labor relations by the same individual. That could not be expected to occur whenever entities of any size are involved. In such situations, as here, it is only necessary to conclude that there had been an ability by one entity to exercise "clout" over labor relations of others. A preponderance of the evidence shows that existed here.

Before departing from this subject, it should be noted that there has been no showing that Respondents ABMC and PI control Respondent ABC's management or labor relations, nor that either or both of the former owned or financially controlled Respondent ABC. Similarly, there is no evidence in those areas of Respondent PI's control over Respondent ABMC. However, single-employer analysis is not an exercise in symmetry. "An entity can belong to the single employer by giving as well as by receiving directions about labor policy," NLRB v. International Measurement & Control, 978 F.2d 334, 340-341 (7th Cir.1992), and that applies also in the other areas scrutinized in making single-employer determinations. A contrary conclusion would leave virtually impossible a single-employer relationship between any parent and its subsidiaries or divisions.

Therefore, I conclude that a preponderance of the evidence establishes that a single-employer relationship did exist among Respondents at all times material to this proceeding. obviously in reaching that result, I have relied in part on some events and incidents occurring more than 6 months prior to the filing of the charges. Yet, contrary to

the argument made in Respondent ABC and ABMC's brief, such reliance does not constitute disregard of Section 10(b) of the Act. For, those events and incidents have been relied on solely as illustrations of existing, so far as the record discloses, ongoing relationships during the 6 month period prior to filing of the charges. That is not barred by Section 10(b) of the Act. By analogy, it would be absurd to conclude that an individual cannot be found to be a statutory supervisor merely because he/she exercised concededly ongoing supervisory authority only before commencement of the 6 month statute of limitations.

E. The Bargaining Obligation

*30 The conclusion that two or more entities constitute a single employer does not implicitly resolve the issue of continued appropriateness of a historic bargaining unit. Nevertheless, an employment transfer of represented employees from one to another of those entities will not, of itself, obliterate a historic unit and whatever obligations have arisen as a result of its existence. This is so even if, as a result of that transfer, the unit is diminished in scope or composition. For such reductions, of themselves, do not destroy the continued appropriateness of a historic unit. That will occur only if the unit which remains is no longer viable or if its continued existence in diminished form is contrary to public policy.

Here, as a result of Respondent PI's closure and of Respondent ABMC's commencement of but some of its laboratory operations, the historic bargaining unit of medical laboratory technologists changed in scope. From a multilocation unit which included two acute care hospital locations, it was reduced to a unit confined to only acute care hospital locations. Of course, even in that reduced form, the unit remained one that is employerwide in scope. But the employment of unit members only at acute care hospital campuses brings into play another consideration.

As set forth in subsection I,A, supra, the Board has established rules enumerating the units which it will regard as appropriate at acute care hospitals. In contrast to other

situations where units are treated as more akin to guidelines — solely as analytical predicates which are relatively freely subject to exception or revision whenever some evidence of differing circumstances is presented in particular situations — the units enumerated in Section 103.30 of the Board's Rules are the product of extensive litigation and proceedings which extended over more than a decade and which consumed considerable effort and resources at the Board, circuit court, and Supreme Court levels. See generally American Hospital Assn. v. NLRB, 449 U.S. 606 (1980). An indication of the importance attached to Section 103.30's acute care hospital units is provided by the very fact that the Board has chosen to embody them in its Rules and Regulations. The Board has not chosen to follow such a course even with regard to units which it regards as presumptively appropriate because they are specified in Section 9(b) of the Act: "employer unit, craft unit, plant unit."

Furthermore, units have not been specified in Section 103.30 merely as a result of administrative considerations which the Board has chosen to exercise. Those units' enumeration has been one result of a direction by Congress, made in conjunction with enactment of the 1974 health care amendments to the Act, that the Board exercise care to minimize labor-management strife in the health care industry. Given the considerations in this and the immediately preceding paragraphs, there is ample basis for concluding that public policy favors the units set forth in Section 103.30(a) and (f) and, further, does not favor representation elections and bargaining orders in units at acute care hospitals which do not conform to one of them.

*31 A unit confined to medical laboratory technologists is not one of the units listed in Section 103.30(a). To be sure, those employees, now working at the Ashby and Herrick Campuses, had been represented by the Union for over a decade. Section 103.30 does make allowance for "existing non-conforming units [.]" That allowance might justify a conclusion that a "non-conforming unit" confined to that single classification is appropriate had it actually been the historic "existing" unit during the period preceding mid-

June. But, as pointed out in the second paragraph of this subsection, since mid-June it has differed from the previously "existing" unit. From being two of a number of locations, the acute care hospital laboratories are now the only locations at which medical laboratory technologists employed by Respondents are working. Consequently, since mid-June what is left of the historic unit can not be characterized as the unit "existing" prior to then.

The General Counsel conceded that a unit confined to medical laboratory technologists at acute care hospitals would not be regarded as appropriate in light of Section 103.30. That concession, of course, was the reason for not including a successorship allegation in the amended consolidated complaint. Yet, that same unit is all that remains of the historic unit as it existed prior to mid-June. It can only be concluded that the portion of that unit now left is substantially different from the historic one.

Of course, it is accurate that prior to 1986 there had been units confined to medical laboratory technologists for a number of years, as described in subsection I,B, supra. Still, the 6 years that intervened between 1986 and mid-June is significant in duration. During that time those employees had been included in a broader overall unit. As a result, the pre-1986 unit situation is too remote to be relied on, especially in light of emergence of the Board's Rules enumerating units regarded as appropriate in acute care hospitals.

Nor is that result altered by Respondent ABMC's willingness during May and June to conclude an agreement with the Union for medical laboratory technologists. The fact that, as a matter of convenience, private parties are willing to create units not consistent with Board unit principles does not operate to deprive the Board of ability to follow its own unit guidelines, particularly ones embodied in its Rules and Regulations and ones formulated as a means of implementing an overall Congressional direction. In short, through their own arrangements, private parties cannot compel the Board to set aside its own rules and policies, and to blindly place its imprimatur on inconsistent private desires. Therefore, inasmuch as a unit of medical laboratory technologists

is not one of the units specified as appropriate at acute care hospitals, I conclude that it is not a unit for which Respondent should be directed to bargain with the Union as the agent of employees in it.

*32 That does not conclude analysis, however. Left for consideration is the effect after mid-June of the remaining term of the 1991-1993 collective-bargaining contract. The proviso to Section 8(d) of the Act requires parties, inter alia, not to "terminate or modify" a contract during its term. That specific provision is one means of promoting Section 1 of the Act's policy of "encouraging the practice and procedure of collective bargaining." To implement those statutory policies the Board has formulated the contract bar rule which, to the extent pertinent here, "bars employers from repudiating [a] contract or withdrawing recognition of a union for the contract term." (Citation omitted.) NLRB v. Dominick's Finer Foods, 28 F.3d 678, 679 (7th Cir.1994).

Of course, that is precisely what Respondents have done here. To be sure, as concluded above, the unit remaining after mid-June is not one in which the Board would direct an election or impose an affirmative bargaining order. Yet, to implement the above-stated statutory provisions and, further, to preserve industrial stability and employee freedom of choice, it is not unprecedented to oblige parties to continue honoring collective-bargaining contracts and to withhold until their expiration challenges to the continued representative status of bargaining agents. See, e.g., John Deklewa & Sons, 282 NLRB 1375, 1386-1388 (1987); NLRB v. Dominick's Finer Foods, supra; Fender Musical Instruments, 175 NLRB 873, 874 (1969).

I regard that to be the appropriate course to follow here. Not only does it promote the policies set forth above, but it contravenes no statutory policy and works no injustice to Respondents. Although what remained of the unit after mid-June had not been one countenanced by the Board, it was not a unit which totally lacked viability. It was what was left of a historic unit. It was employerwide in scope, consisting of all medical laboratory technologists who remained employed by Respondents. Indeed, it was a unit in which

Respondent ABMC had been willing to recognize the Union had the parties been able to negotiate satisfactory terms for a contract that would cover those employees.

It might be argued that to oblige Respondents to continue honoring the contract for its remaining term would compel them to run the risk of establishing a new history of bargaining in a unit which, under Section 103.30 of the Board's Rules, would not otherwise be regarded as appropriate. Yet, Respondents would have been continuing to honor that contract merely to satisfy a statutory obligation. From the outset, Respondent ABMC had made plain that it regarded the unit as not appropriate for recognition and bargaining. Against that background, a statutorily compelled period of contract observance could hardly be later characterized as establishing a new "existing" bargaining history sufficient to compel perpetuation thereafter on a "non-conforming unit" basis.

A conclusion that Respondents had been obliged to honor the contract for its remaining term is not nullified by the Union's initial willingness to bargain, if possible, for a replacement contract with Respondent ABMC. Even where parties have been willing to discuss modifying particular contractual provisions during a contract's term, that has not constituted a contract reopener, Mack Trucks, 294 NLRB 864, 865 (1989), and has not allowed one party to modify contractually established terms without consent of the other party. United Rigging & Hauling, 310 NLRB 828 (1993), and cases cited therein. Obviously, if parties cannot make midterm modifications of some contractual terms without agreement to those changes by the other party, then parties are not free under the Act to modify or change all contract terms by repudiating a contract altogether.

*33 Certainly it cannot be concluded that complete abandonment of an existing contract occurs merely because of negotiations for a replacement contract. Something more is required to establish what in effect would be a waiver of the obligation to continue honoring existing contractual terms. As pointed out in subsection I,D, supra, there is no evidence that the Union ever expressly stated that, in bargaining with

Respondent ABMC, it was abandoning the 1991-1993 contract or its terms.

Nor is there evidence sufficient to establish that the Union somehow otherwise did anything that satisfies the standard for waiver of continued contract observance. So far as the evidence shows, during the separate negotiations with Respondent ABMC and with Respondent PI, the Union never demanded specifically that Respondents continue honoring the 1991-1993 contract with respect to medical laboratory technologists working at the two hospital campuses after mid-June. On the other hand, the obligation to honor a contract's terms is an ongoing one imposed by the Act. Unlike an obligation to extend initial recognition, for example, the statutory obligation to continue honoring a contract's terms exists without need for a specific demand to continue doing so. Demand is not a separate analytical element of the statutory obligation to continue honoring a contract. If Respondents had wanted to ascertain whether the Union was abandoning the 1991-1993 contract, through its negotiations in May and June, they, or one of them, had only to put that question to the Union and its negotiators. Respondents did not do so and, accordingly, they ran the risk of liability for not continuing to honor the contract's provisions following employment of medical laboratory technologists by Respondent ABMC. In any event, by September Respondents were given specific notice that the Union did not consider the 1991-1993 contract as an abandoned one. For, as described in subsection I,D, supra, an allegation of refusal to honor that contract had been included in the amended charge in Case 32-CA-12599-1.

Therefore, I conclude that Respondent did violate Section 8(a)(5) and (1) of the Act by failing to continue honoring the 1991-1993 contract's terms after mid-June until its expiration date, but further conclude that they did not violate the Act by refusing to thereafter recognize the Union as the bargaining agent of medical laboratory technologists whom they employed, once that contract expired.

CONCLUSION OF LAW

By failing to continue honoring the terms of the 1991-1993 collective-bargaining contract for medical laboratory technologists employed at their Ashby and Herrick Campuses from mid-June until that contract's expiration, Pathology Institute, Inc., Alta Bates Corporation, and Alta Bates Medical Center, a single employer, committed unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the Act. However, the Act has not been violated in any other manner alleged in the amended consolidated complaint.

REMEDY

*34 Having concluded that Pathology Institute, Inc., Alta Bates Corporation, and Alta Bates Medical Center are a single employer which engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and, further, that they be ordered to take certain affirmative action intended to effectuate the policies of the Act. With respect to the latter, they shall be ordered to make whole all medical laboratory technologists who worked at the Ashby and Herrick Campuses of Alta Bates Medical Center from June 1992 until October 31, 1993, for lost wages and benefits, calculated in accordance with Ogle Protection Service, 183 NLRB 682, 683 (1970), and, further, to remit any payments that should have been made under that contract to the appropriate trust and pension funds as determined in the manner prescribed in Merryweather Optical Co., 240 NLRB 1213 (1979), reimbursing those employees for any losses or expenses they may have incurred because of the failure to make payments to those funds, in the manner prescribed in Kraft Plumbing & Heating, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir.1981). Interest shall be paid on any amounts owing and shall be computed in the manner prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[4]

ORDER

The Respondents, Pathology Institute, Inc.; Alta Bates Medical Center; and Alta Bates Corporation, Berkeley, California, their officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Failing to honor the terms of any collective-bargaining contract which may be negotiated between them, or one of them, and Office & Professional Employees International Union, Local 29, AFL-CIO, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole all medical laboratory technologists employed by Alta Bates Medical Center at its Ashby and Herrick Campuses from the time they were hired by it in June 1992 until October 31, 1993, and all benefit funds, in the manner prescribed in the remedy section of this decision, for any losses of income or benefits, and for any expenses incurred in connection with those benefit fund losses by those employees during that period, with interest on any amounts owing.

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll, business and other records necessary to compute the backpay rights set forth in subparagraph 2,a, above.

---

[4]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Post at the Ashby and Herrick Campuses in Berkeley, California, copies of the attached notice marked "Appendix."[5] Copies of that notice on forms provided by the Regional Director for Region 32, after being signed by their authorized representatives, shall be posted by the Respondents immediately upon receipt and be maintained for 60 consecutive days in conspicuous places, including all places in those campus locations where notices to employees are customarily posted. Reasonable steps shall be taken the Respondents to ensure that those notices are not altered, defaced, or covered by any other material.

*35 (d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

IT IS FURTHER ORDERED that the amended consolidated complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

Dated: August 31, 1994

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice.

---

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to honor the terms of any collective-bargaining contract with Office & Professional Employees International Union, Local 29, AFL–CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole all medical laboratory technologists employed by Alta Bates Medical Center at its Ashby and Herrick Campuses from the time they were hired by it in June 1992 until October 31, 1993, and all benefit funds for any losses of income or benefits, and for any expenses incurred in connection with those benefit fund losses, by those employers during that period, with interest on any amounts owing.

PATHOLOGY INSTITUTE, INC.; ALTA BATES MEDICAL CENTER; AND ALTA BATES CORPORATION

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.) 320 NLRB 1050, 320 NLRB No. 128, 1996 WL 142566 (N.L.R.B.), 152 L.R.R.M. (BNA) 1017

NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 152

§ 152. Definitions

When used in this subchapter —

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly.

NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 160

§ 160. Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce.

NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 158

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title:

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

United States of America
Before the National Labor Relations Board
Washington, D.C.

Case Nos. 32-CA-12599-1 and 32-CA-12927

PATHOLOGY INSTITUTE, INC.;
ALTA BATES MEDICAL CENTER; and
ALTA BATES CORPORATION:

and

OFFICE & PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 29, AFL-CIO

RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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October 19, 1994

* * *

48. *Page 23, Lines 2–4*

The ALJ's ruling that merely potential rather than actual control of labor relations is necessary to establish common control of labor relations is contrary to Board law.

49. *Page 23, Lines 3–4*

The ALJ's conclusion that centralized control of labor relations existed between the three Respondents is erroneous, unsupported by the record, and contrary to Board law.

* * *

United States of America
Before the National Labor Relations Board
Washington, D.C.

PATHOLOGY INSTITUTE, INC.;
ALTA BATES MEDICAL CENTER and
ALTA BATES CORPORATION;

and

Case Nos. 32-CA-12599-1 and 32-CA-12927

OFFICE & PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 29, AFL-CIO

RESPONDENTS' BRIEF IN SUPPORT OF THEIR EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE WILLIAM J. PANNIER III'S DECISION AND ORDER

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October 19, 1994

* * *

A. A Lack Of Actual Common Control Over Labor Relations Characterized The Relationship Among Respondents ABC, ABMC and PI.

It is well settled that separate corporations are normally treated as separate employers, unless a contrary character is proven. *United Telegraph Workers v. NLRB*, 571 F.2d 665, 667, 97 LRRM 2462 (D.C. Cir.), *cert. denied*, 439 U.S. 827 (1978). Of the four factors examined as part of a single employer analysis (common management, common ownership, common control of labor relations and integration of operations), "common ownership" is accorded the least weight, and "common control over labor relations" the most. *Id.* at 667. *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1337 (1988) ("particular emphasis has been placed on centralized control over labor relations"). *See also, Local 3 IBEW (Telecom Plus of New York City)*, 286 NLRB 235 (1987) ("common ownership is a feature of any conglomerate organization, and is not determinative where common control [of labor relations] is not shown"); *Alabama Metal Products*, 280 NLRB 1090, n.1 (1986) (centralized control of labor relations "is considered critical to a single employer finding."); *Carvel Company*, 226 NLRB 111 (1976) ("[common ownership] factor is not determinative in the absence of common control of labor relations policies."); *Gerace Construction*, 193 NLRB 645 (1971) ("a critical factor in determining whether separate legal entities operate as a single employing enterprise is the degree of common control of labor relations."); *UA Local 343 of the United Assoc. of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, et. al. v. Nor-Cal Plumbing, Inc., et al.*, ____ F.2d ____, 94 C.D.O.S. 7860, 7862 (9th Cir., October 14, 1994) (centralized control of labor relations is the most important factor in single

employer analysis). (Attached is a copy of this case for the Board's convenience.)

In *Western Union Corp.*, 224 NLRB 274, 276 (1976), the Board noted the pivotal role played by common control over labor relations:

> A critical factor in determining whether separate legal entities operate as a single employing enterprise is the common control of labor relations policies and that common ownership is not determinative where such requisite common control is not shown.

Id. at 276. There, the Board refused to find a single employer relationship among a parent corporation and several of its subsidiaries, noting that "day-to-day management responsibilities and decisions are handled at a level far below" the companies' common officers. *Id.* at 276. Moreover, it observed, common control over labor relations "must be actual or active, as distinguished from potential." *Id. See also Gerace Construction*, 193 NLRB at 645. ("common control must be actual or active, as distinguished from potential control").

* * *

However, again, it is the *actual* and not potential control which is determinative... Finally, while Respondent ABC had potential authority over Respondent PI, no evidence was presented to show that Respondent ABC actually exercised this control.

Moreover, the ALJ's reliance on the alleged potential authority of ABC to oversee budgetary or financial matters of ABMC and PI is contrary to Board law. The Board has squarely held that centralized control of labor relations cannot be established by inference. *See Western Union*, 224 NLRB at 277 (merely because parent company reserved certain controls over budgets and selection of officers and directors did not establish centralized control of subsidiaries'

labor relations). The Board held that to infer centralized control of labor relations from financial control would "result in an automatic finding in every case that a wholly owned subsidiary or the constituent companies are a single employer." *Id.* at 275 (rejecting argument of dissenting Member Fanning).

No.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 96-70260
96-70382
96-70383
NLRB Nos. 32-CA-12599-1
32-CA-12927

ALTA BATES CORP., et al.,
Petitioners-Cross-Respondents,
and
PATHOLOGY INSTITUTE, INC.,
Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross-Petitioner,
and
OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION,
LOCAL 29, AFL-CIO,
Intervenor.

PETITIONERS-CROSS-RESPONDENTS ALTA BATES CORPORATION'S AND ALTA BATES MEDICAL CENTER'S, AND RESPONDENT PATHOLOGY INSTITUTE'S JOINT OPENING BRIEF IN SUPPORT OF PETITION FOR REVIEW OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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a. Potential Control Is Not a Substitute for the Absence of Actual Control of Labor Relations.

Faced with a total absence of evidence of actual centralized control of labor relations, the ALJ simply made new law:

> [W]henever entities of any size are involved . . . it is only necessary to conclude that there had been an ability by one entity to exercise "clout" over labor relations of others.

(Decision at 16, 1ER18).

The ALJ's new test is overreaching. Obviously, any parent company has the "ability to exercise clout" over a subsidiary. *Esmark, Inc. v. NLRB*, 887 F.2d 739, 757 (7th Cir. 1989). It is only when the parent uses "its ownership interest to command, rather than merely cajole, [that] the possibility of violating the federal labor laws is present." *Id.*

For this reason, the NLRB repeatedly has held *actual* control over labor relations is required, and mere *potential* control by a parent company is insufficient. *E.g., Teamsters, Local 391*, 208 NLRB 540, 543 (1974) (merely because subsidiaries retained parent company's labor relations staff as consultants did *not* establish either "division or the parent exercise[d] actual or active, as opposed to merely potential, control over the every day operations or labor relations of the other"); *Gerace Construction*, 193 NLRB at 645 ("common control must be actual or active, as distinguished from potential control"). *See also NLRB v. Transcontinental Theaters, Inc.*, 568 F.2d 125, 128-29 (9th Cir. 1978), *denying enforcement to* 216 NLRB 1110 (1975). The ALJ's holding is directly contrary to all authority.

In *Western Union*, the NLRB expressly rejected the "means to control" argument adopted by the ALJ here. The NLRB held a parent company's reservation of authority over subsidiaries' budgets and selection of officers and direc-

tors did *not* establish actual, centralized control of subsidiaries' labor relations. 224 NLRB at 277. The NLRB stated to infer centralized control of labor relations from financial control would "result in an automatic finding in every case that a wholly owned subsidiary or the constituent companies are a single employer." *Id.* at 275.

In *Transcontinental Theaters*, this Court rejected an earlier attempt by the NLRB to infer control of labor relations from purported financial leverage. The NLRB concluded a theater owner and its lessee were a single employer. 568 F.2d at 128. The Board found the owner of the theater controlled labor relations because, *inter alia*, the lessor had a right to impose a ceiling on operating costs via approval of the theater's budget. *Id.* at 128-29. This Court rejected the NLRB's attempt to infer labor relations control from the mere power to control the purse strings. *Id.* at 129. In so holding, this Court relied on *Gerace, supra*, and quoted with approval the D.C. Circuit, *viz.*:

> True the ultimate power to control each division belonged to Hearst, since each division manager was answerable to Hearst. As the Board correctly held, however, *the test is not whether an unexercised power to control exists. There must be in addition such actual or active common control, as distinguished from merely a potential,* as to denote an appreciable integration of operations and management policies.

Id. at 129 (emphasis added) (quoting *AFTRA v. NLRB*, 462 F.2d 887 (D.C. Cir. 1972)).

Here, the Decision repeatedly adverted to the scarcity of evidence of actual, centralized control among the entities:

> Obviously, there has not been an actual exercise of labor relations control here that is so extensive and intrusive as occurs, for example, when a single proprie-

> tor operates two interrelated small companies each of which employs but a handful of employs [sic].
>
> * * *
>
> [T]here has been *no showing that Respondent ABMC and PI control Respondent ABC's management or labor relations,* nor that either or both of the former owned or financially controlled ABC. *Similarly there is no evidence in those areas of Respondent PI's control over Respondent ABMC.*

(Decision 15-16 1ER17-18) (emphasis added).

Because there is no substantial evidence of *actual,* centralized control of labor relations, the NLRB's decision is fatally flawed.

b. The Case Law on Which the NLRB Relied Does Not Support Its Conclusion That a Parent Company's Potential to Control Without More Is Sufficient to Support a Finding of Centralized Control of Labor Relations.

In finding potential control via budgetary approval was sufficient to confer single employer status, the ALJ purportedly relied on the Eighth Circuit's *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1043 (8th Cir. 1976). *Royal* cannot sustain the gloss the ALJ attempted to paint upon it.

In *Royal,* the NLRB held that Royal, *a mere unincorporated division of Litton Business Systems, Inc. ("LBS")* was a single employer with LBS. *Id.* at 1042. Here, the entities in issue are separately incorporated and scrupulously have observed separate corporate forms (*see supra* pp. 5-7; *infra* pp. 44, 60-61). There are other crucial factual distinctions between *Royal* and the instant case as well:

> [I]n addition to the evidence of ownership and control over fundamental decision making processes . . ., the Board *placed particular reliance* upon the role of Litton

> in the labor negotiations and the decision to close the Springfield plant. The Board considered the patterns and practices of labor relations in other divisions of Litton in which management stressed the important role that Beverly Hills (Litton's home office) would play in labor contract decisions. . . . It noted that Royal's plant manager Jurras had said during the 1955 contract negotiations that he would have to get approval for his final offer from Beverly Hills. It then observed that Royal's attorney Ellis made similar statements which were reinforced by the presence of Peter Irwin, Litton's director of labor relations, at [Royal] bargaining sessions. . . .
>
> ***
>
> By staffing division officers with Litton officers and retaining control over all fundamental decisions, *Litton had positioned itself to control the course of Royal's negotiations.*

533 F.2d at 1042-43 (emphasis added).

The court's statement in *Royal* regarding control of labor relations is as follows:

> [i]n assessing the appropriateness of single employer treatment, . . . [a] more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries *and whether its course of conduct encouraged or permitted the local negotiators to so represent the situation to union negotiators for the purpose of achieving a tactical or strategic objective.*

Id. at 1043 (emphasis added).

However, the NLRB selectively quoted only the following language from *Royal Typewriter*:

> [the] more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries.

(Decision at 15, 1ER17).

The ALJ omitted the entire second half of the holding, terminating the sentence before the "and" without even so much as an ellipsis. *Royal*'s holding requires findings that the parent had the "means to exercise its clout" *and* that it encouraged its division to flaunt the economic leverage of the parent as a negotiating tool. The parent in *Royal* did so, thereby injecting itself into the division's labor relations.

No. 97-0465 (2)

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OCT 17 1997
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

ALTA BATES CORPORATION,
ALTA BATES MEDICAL CENTER, AND
PATHOLOGY INSTITUTE, INC.,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
AND
OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 29, AFL-CIO,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE CALIFORNIA HEALTHCARE ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF PETITIONERS ALTA BATES CORPORATION, ALTA BATES MEDICAL CENTER, AND PATHOLOGY INSTITUTE, INC.

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17 pp

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Introduction	3
II. The Growth of Affiliated Hospital Groups	4
III. The Ninth Circuit's Decision Will Have a Devastating Impact on Affiliated Hospital Groups.	6
A. The Ninth Circuit's Decision Eviscerates the Statutory Protections Against Secondary Boycotts and, Contrary to Clear Congressional Intent, Promotes the Spread of Labor Disputes Among and Between Affiliated Hospitals.	6
B. The Ninth Circuit's Decision Creates Uncertainty About the Scope and Application of Collective Bargaining Agreements Among Affiliated Hospitals.	8
C. The Ninth Circuit's Decision Potentially Makes Affiliated Hospitals Liable for the Discrimination and Wage and Hour Claims Against Their Distant Affiliates.	9
CONCLUSION	12

TABLE OF AUTHORITIES

Page

Cases

Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) 9

Alta Bates Corp. v. NLRB, 1997 WL 303259 1997 (9th Cir. June 4, 1997) 3

Baker v. Stuart Broadcasting Co., 560 F.2d 389 (8th Cir. 1997) 10

Brower-Coad v. Fundamental Brokers, Inc., 856 F. Supp. 147 (1993) 10

Cruz v. Central States Joint Bd. Health and Welfare Trust Fund, 1993 WL 259444 (N.D. Ill. 1993) 10

Field v. Corp. Office Systems, Inc., 1995 WL 399540 (N.D. Ill. 1995) 10, 11

Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) 10

Hishon v. King & Spaulding, 467 U.S. 69 (1984) 10

Lans v. Kiska Constr. Corp., 1997 WL 313162 (S.D.N.Y. 1997) 10

Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) 10

Lorrance v. AT&T Tech. Inc., 490 U.S. 900 (1989) 10

NLRB v. St. Francis Hosp. of Linwood, 601 F.2d 404 (9th Cir. 1979) 7

Radio Union v. Broadcast Service, 380 U.S. 255 (1965) 3

Schiele v. Charles Vogel Mfg. Co., Inc., 787 F. Supp. 1541 (D. Minn 1992) 10

Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir. 1981) 3

TABLE OF AUTHORITIES

	Page
Cases	
Van Norman v. Harman Mgmt. Corp., 1995 WL 803508 (N.D. Cal. 1995)	11
Statutes	
Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, *et seq.*	9
Americans with Disabilities Act of 1990, 29 U.S.C. §§ 12101, *et seq.*	9
Cal. Bus. & Prof. Code §§ 2400, *et seq.*	5
Civil Rights Act of 1991, 42 U.S.C. §§ 2000e, *et seq.*	9
Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, *et seq.*	9
Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601, *et seq.*	9
National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*	3, 6, 7
Pub. L. No. 93-360, 88 Stat. 395 (1974)	7
Supreme Court Rule 37.6	2
Other Authorities	
U.S. Code Cong. & Adm. News (1974)	7, 8
N.L.R.B. General Counsel Guidelines: Health Care Institutions, 4 Lab. L.Rep. (CCH) ¶9046 at 15,096-98 (1978)	8
Mark A. Hall, *Managed Competition and Integrated Health Care Delivery Systems*, 29 WAKE FOREST L. REV. 1 (1994)	5

TABLE OF AUTHORITIES

Page

Other Authorities

Williams M. Stelwagon, *Does a Healthy Patient Need a Cure?* 69 ST. JOHN'S L.REV. 553 (1995) 4

Thomas M. Susman & David A. Martland, *The Brave New World of Health Care: Hospital Mergers and Joint Ventures in the '90s* 38 BOSTON B.J. 3 (1994) 5

No. 97-0465

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

ALTA BATES CORPORATION,
ALTA BATES MEDICAL CENTER, AND
PATHOLOGY INSTITUTE, INC.,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
AND
OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 29, AFL-CIO,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE CALIFORNIA HEALTHCARE ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF PETITIONERS ALTA BATES CORPORATION, ALTA BATES MEDICAL CENTER, AND PATHOLOGY INSTITUTE, INC.

INTEREST OF AMICUS CURIAE[1]

The California Healthcare Association ("CHA") is a nonprofit association whose members consist of hospitals, health systems, physician groups, and other health care providers in California. CHA is one of the largest health care trade associations in the nation with more than 630 hospital, health system, and physician group members, and 175 affiliate and personal members. The purpose of CHA is to provide its members with proactive leadership in health policy development, legislative and regulatory advocacy, and legal representation.

Many members of CHA belong to affiliations of autonomous hospitals that, in some cases, are commonly owned or operated under affiliation relationships. Unless the Ninth Circuit's decision is reviewed and reversed, these members will face the threat of becoming embroiled in the labor disputes of their distant affiliates. This could have a direct and devastating impact on their ability to deliver critical health care services to patients. These members may also face the threat of financial liability for the equal employment and wage and hour violations of their distant affiliates. CHA submits this brief in an effort to protect the vital interests of its members from the effects of the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

The Ninth Circuit's unprecedented expansion of the single employer doctrine will have a devastating impact on hospitals and other health care facilities that are autonomous but have relationships with other organizations.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certifies that this brief was authored in whole by counsel for amicus curiae and that no other person or entity, except for amicus curiae, made a monetary contribution to the preparation or submission of the brief.

Among other things, the decision will subject these affiliated hospitals to strikes, picketing, and other forms of economic pressure by unions that have labor disputes with distant affiliates. This result could have potentially catastrophic patient care implications and runs contrary to the Congressional intent behind the 1974 amendments to the National Labor Relations Act. The Ninth Circuit's decision also threatens to make affiliated hospitals financially liable for the equal employment and wage and hour violations of their distant affiliates. For these reasons, the Petition for a Writ of Certiorari should be granted and the decision of the Ninth Circuit reversed.

ARGUMENT

I. Introduction

The single employer doctrine allows the National Labor Relations Board (the "Board") to treat two or more otherwise separate entities as a single employer for purposes of the National Labor Relations Act (the "NLRA" or "Act"), 29 U.S.C. §§ 151, *et seq.*, depending upon the degree of integration among the entities. In determining whether separate entities constitute a single employer, the Board and the courts consider four factors: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership and financial control. *Radio Union v. Broadcast Service*, 380 U.S. 255, 256 (1965). Of these four factors, the centralized control of labor relations is viewed as the most critical. *See, e.g., Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1075 (1st Cir. 1981).

In *Alta Bates Corporation v. NLRB*, 1997 WL 303259 (9th Cir. June 4, 1997), the Ninth Circuit affirmed a decision of the Board which had adopted in its entirety a decision of an Administrative Law Judge ("ALJ") effectively holding that the *mere potential* to exercise common

control over each other's labor relations and operations suffices to make separate entities a single employer. Alta Bates Corporation, Alta Bates Medical Center, and Pathology Institute, Inc., the Petitioners in that case, have filed a Petition for a Writ of Certiorari in this Court (hereinafter "Petition"). The Petition explains that the Ninth Circuit's decision reverses four decades of circuit court and Board authority that had consistently applied the single employer doctrine to require the *actual* exercise of common control over labor relations and operations. (Petition at 8-11.) It also explains that the Ninth Circuit's decision relies on a misinterpretation of precedent and creates a split among the circuits. (Petition at 11-15.) Those arguments are not repeated herein.

Instead, this brief addresses the devastating impact the Ninth Circuit's decision will have on a large segment of health care providers nationwide. As explained below, Alta Bates Medical Center and its affiliates reflect a growing trend in the health care industry toward affiliations of commonly owned but otherwise autonomous hospitals ("affiliated hospitals"). Among other things, the Ninth Circuit's decision threatens to embroil affiliated hospitals in the labor disputes of their distant affiliates, a result that has potentially catastrophic patient care implications and runs contrary to the Congressional intent behind the 1974 amendments to the Act. The decision also threatens to make affiliated hospitals financially liable for the equal employment and wage and hour violations of their distant affiliates. For all of these reasons, the Petition for a Writ of Certiorari should be granted and the decision of the Ninth Circuit reversed.

II. The Growth of Affiliated Hospital Groups

Since the mid-1980's, the health care industry has undergone a dramatic transformation as significant numbers of independent hospitals have combined into hospital net-

works. *See* William M. Stelwagon, *Does a Healthy Patient Need a Cure? A Response to Health Care Industry Proposals to Reform Antitrust Analysis of Horizontal Hospital Mergers*, 69 ST. JOHN'S L. REV. 553, 553-54 (1995). The proliferation of hospital networks has occurred due to a variety of factors, including (1) a need to cut costs and respond to overcapacity in certain health care markets; (2) a desire to capture market share; (3) a shift in federal policy from hospital expansion toward control of heaith care costs; and (4) a desire to take advantage of common contractual relationships with public and private payers. *Id.*; Thomas M. Susman & David A. Martland, *The Brave New World of Health Care: Hospital Mergers and Joint Ventures in the '90s,* 38 BOSTON B.J. 3 (1994) (attributing hospital combinations to "[o]vercapacity, downward pressures on prices, the desire of large buyers to obtain a full array of . . . services from a single provider, and the specter of significant health care reform legislation").

Hospital networks take on a myriad of forms and vary significantly depending upon the degree to which their operations are integrated. *See* Mark A. Hall, *Managed Competition and Integrated Health Care Delivery Systems,* 29 WAKE FOREST L. REV. 1, 8-9 (1994). For example, some tightly-integrated networks own their own hospitals, employ the physicians, have a single board of directors, and market their own insurance. Other more loosely-integrated networks are commonly-owned but autonomously operated. *Id.* These loose affiliations are particularly prevalent among California's nonprofit hospitals due to a state law provision that exempts these types of hospital affiliations from the prohibition on the corporate practice of medicine. *Id.*[2]

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[2]The corporate practice of medicine provisions in California's Medical Practice Act, Cal. Bus. & Prof. Code §§ 2400, *et seq.*, prohibit most hospitals in California from employing physicians. *Id.* at § 2400. Under

Alta Bates typifies a loosely-integrated hospital network. The Ninth Circuit's decision will have a dramatic impact on all similar networks since, at least under the ALJ's reasoning, they will always have a "potential to control" the labor relations of each other and thus constitute single employers.

III. The Ninth Circuit's Decision Will Have a Devastating Impact on Affiliated Hospital Groups.

A. The Ninth Circuit's Decision Eviscerates the Statutory Protections Against Secondary Boycotts and, Contrary to Clear Congressional Intent, Promotes the Spread of Labor Disputes Among and Between Affiliated Hospitals.

The Petition notes that the Ninth Circuit's expansion of the single employer doctrine effectively nullifies the Act's prohibition on secondary boycotts with respect to commonly owned but otherwise autonomous corporate entities. (Petition at 15-16.) *See* 29 U.S.C. § 158(b)(4). It also notes that the Ninth Circuit's decision will make employers hesitant to hire workers from any commonly owned business. (Petition at 16.)

The impact of the Ninth Circuit's decision will be felt most profoundly in the health care industry as affiliated hospitals will be subjected to strikes, picketing, and other forms of economic pressure by unions that have labor disputes with distant affiliates. In fact, the expansion of the single employer doctrine could allow striking unions to establish picket lines at autonomous facilities throughout a hospital network. Nurses and other employees would have to evaluate whether to honor the picket lines. Any unionized

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certain circumstances, however, this prohibition does not apply to non-profit institutions and foundations. *Id.*

employees would probably be prohibited from crossing any sanctioned picket line by provisions in collective bargaining agreements and union bylaws to which such employees would be contractually bound. This could cause a potentially catastrophic disruption in patient care throughout an entire hospital network, even if the underlying labor dispute involved a handful of employees at an isolated facility.

This result runs contrary to Congress' intent as expressed in its 1974 amendments to the Act which extended coverage to non-profit hospitals. Pub. L. No. 93-360, 88 Stat. 395 (1974). The dominant theme in the amendments and their legislative history was Congress' intent to minimize strikes and labor disputes in the health care industry and the accompanying disruption of patient care. 1974 U.S. Code Cong. & Adm. News, pp. 3946-60.

> In considering legislation to amend the Act, it was immediately recognized that the health care industry was unique and that disruptions caused by organizational drives and related activities at a hospital were a far more serious concern than at an industrial plant given the grave nature of medical care and the fact that "[hospital] care is not storable."

NLRB v. St. Francis Hosp. of Linwood, 601 F.2d 404, 411 (9th Cir. 1979).

For example, the 1974 amendments require unions to provide 10-days advance notice of any intention to strike or picket a health care institution. 29 U.S.C. § 158(g). Also, the legislative history expressed Congress' intent to limit the ally doctrine as it applies to health care institutions. Under the ally doctrine, the prohibition on secondary boycotts does not apply to employers who perform services that striking employees would have otherwise performed. In particular, Congress noted that health care institutions should not be

subjected to the ally doctrine, and therefore picketing and strikes, simply because they provide life-saving services for patients of a struck health care institution. 1974 U.S. Code Cong. & Adm. News, pp. 3951; *see also N.L.R.B. General Counsel Guidelines: Health Care Institutions*, 4 Lab. L. Rep. (CCH) ¶ 9046 at 15,096-98 (1978).

The Ninth Circuit's decision ignores this legislative history and eviscerates the statutory protections against strikes, picketing, and resultant disruption of patient care. The decision creates a loophole to these legislative mandates by allowing unions to utilize the single employer doctrine as applied by the ALJ to expand labor disputes to distant and loosely affiliated hospitals.

B. The Ninth Circuit's Decision Creates Uncertainty About the Scope and Application of Collective Bargaining Agreements Among Affiliated Hospitals.

The Ninth's Circuit's decision creates uncertainty with respect to the scope and applicability of collective bargaining agreements. For example, many collective bargaining agreements broadly define the bargaining unit in terms of the type of work performed without any site specific or geographical limitations. Unions could argue that such agreements apply to distant affiliates who may have employees performing the same type of work. These arguments could be advanced even though such an expansion of the bargaining unit was never contemplated by the parties to the collective bargaining agreement, much less the distant affiliates. At a minimum, the decision could spawn an unprecedented and unwarranted amount of litigation in the health care industry over the application of collective bargaining agreements between affiliated facilities.

Moreover, unionized health care providers will find it difficult to affiliate with other health care providers or groups of providers because of the uncertainty over the

applicability of the collective bargaining agreements to the nonunion members of the affiliation. Unionized health care providers who find it difficult to join affiliations will be unable to take advantage of the myriad of economic and other benefits available through such affiliations.

C. The Ninth Circuit's Decision Potentially Makes Affiliated Hospitals Liable for the Discrimination and Wage and Hour Claims Against Their Distant Affiliates.

The Ninth Circuit's unprecedented expansion of the single employer doctrine has implications that extend far beyond the Act. Indeed, it will have unintended spillover effects on other federal labor and employment laws, including the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"), the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, *et seq.* ("FLSA"), the Americans with Disabilities Act of 1990, 29 U.S.C. §§ 12101, *et seq.* ("ADA"), the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, *et seq.* ("ADEA"), and the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601, *et seq.* ("FMLA"). These statutes derive their strength from the cohesiveness of the overall legislative scheme. Consequently, analogous, and in some instances, virtually identical statutory language and judicial interpretations pervade the legislative and judicial structures of these statutes.

The definition of "employer" under the Act has been incorporated, with minor variations, in Title VII, the FLSA, the ADA, the ADEA, and the FMLA. In *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 419, 421 & n.11 (1975), this Court recognized that the framers of Title VII used the Act's provisions as a model and expressly patterned certain sections after the Act. As such, this Court has often relied

on Board decisions to resolve issues under similar provisions of Title VII. [3]

If the Ninth Circuit's sweeping definition of "employer" is left unreviewed, it can be expected that, following the precedents of this Court, lower courts will incorporate this overly-broad definition in resolving similar issues under Title VII and other federal labor and employment laws. In fact, lower federal courts have already used the Board's single employer doctrine, as it was before the inexplicable change, in determining who is an "employer" for purposes of Title VII, the ADEA and the ADA.

Because the NLRA and Title VII use virtually identical language to define the term "employer," lower federal courts have uniformly extended the construction of the NLRA to the civil rights context, and consistently apply the single employer doctrine to Title VII actions.[4] The Board's

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[3] *See id.* (backpay provision of Title VII expressly patterned after NLRA); *Lorrance v. AT&T Tech., Inc.*, 490 U.S. 900, 909 (1989) (statute of limitations of Title VII and NLRA are construed similarly); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 446-47 & n.26 (1986) (§ 706(g) of Title VII patterned after § 10(c) of the NLRA); *Hishon v. King & Spaulding*, 467 U.S. 69, 76 & n.8 (1984) (construing "term, condition, or privilege of employment" under Title VII with reference to NLRA § 8(d)); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768 (1976) (remedial structures under NLRA and Title VII are similar).

[4] *See, e.g., Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 392 (8th Cir. 1977) (adopting the NLRB's single employer test); *Lans v. Kiska Constr. Corp.*, 1997 WL 313162 *5 (S.D.N.Y. 1997); *Field v. Corp. Office Systems, Inc.*, 1995 WL 399540 *3, 4 (N.D. Ill. 1995); *Brower-Coad v. Fundamental Brokers, Inc.*, 856 F. Supp. 147, 150, 150 & n.6 (1993) (also noting that decisions of district courts indicate that the NLRB standard governs determinations of single employer status under the Equal Pay Act); *Cruz v. Central States Joint Bd. Health and Welfare Trust Fund*, 1993 WL 259444 *1 (N.D. Ill. 1993); *Schiele v. Charles Vogel Mfg. Co., Inc.*, 787 F. Supp. 1541, 1547-48 (D. Minn. 1992).

single employer doctrine has also been incorporated into the ADA and the ADEA.[5]

For these reasons, if an affiliated hospital is found to be a single employer under the ALJ's new liberal test of mere *potential* control, it will also be found financially liable for the discrimination and wage and hour claims of its distant affiliates. Indeed, the single employer doctrine, recognized as a "back-door means of satisfying [federal discrimination statutes'] numerosity requirement,"[6] is already an expansion of employer liability for discrimination. The unintended result of the ALJ's decision will be an unnecessary and unwarranted expansion of the liability of affiliated hospitals under all other federal employment relations statutes. This result could increase the economic distress of an already financially troubled industry.

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[5] *See Van Norman v. Harman Mgmt. Corp.*, 1995 WL 803508 *3 (N.D. Cal. 1995).

[6] *Field v. Corporate Office Systems*, 1995 WL 399540 at *3.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF OF *AMICUS CURIAE* OF EMPLOYERS GROUP IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. INTEREST OF *AMICUS CURIAE* 1

III. SUMMARY OF ARGUMENT 2

IV. ARGUMENT 3

A. Employers and Unions Have Relied for Thirty Years on the Decisions of the Circuit Courts of Appeals and the National Labor Relations Board Holding That an Entity was Not Part of a Single Employer Unless it Exercised Actual Control Over the Labor Relations of a Related Company 3

B. This Decision Destabilizes Labor Relations in Bargaining Unit Determination, Unfair Practice Liability and Economic Action Such as Picketing, Boycotts and Strikes 6

C. This Decision Impacts Other Employment Laws Which Rely Upon the Same Test 7

V. CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Alta Bates Corp. v. NLRB,
116 F.3d 482 (9th Cir. 1997). 1, 2

Bachman Machinery Co. v. NLRB,
266 F.2d 599 (8th Cir. 1959). 4

Boich Mining Company v. NLRB,
955 F.2d 431 (6th Cir. 1992). 4

Drivers, Chauffeurs and Helpers Local No. 639 (Poole's Warehousing),
158 N.L.R.B. 1281 (1966) 3

Emsing's Supermarket, Inc.,
284 N.L.R.B. 302 (1987). 4

Fedco Freight Lines, Inc.,
273 N.L.R.B. 399 (1984). 4

Fike v. Gold Kist, Inc.,
514 F. Supp. 722 (1981 N.D. Ala.). 7

J.G. Roy & Sons Company v. NLRB,
51 F.2d 771 (1st Cir. 1958) 4

Jackson v. NFL,
1994 U.S. Dist. Lexis 8303 8

Leisure World Sales Corp. Inc.,
163 N.L.R.B. 668 (1967). 3-4

Page

Limbach v. Sheet Metal Workers International Assn., 949 F.2d 1241 (3rd Cir. 1991) 4, 6

NLRB v. Transcontinental Theaters, Inc., 568 F.2d 125 (9th Cir. 1977). 5, 6

Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Services, 380 U.S. 255, 85 S.Ct. 876 (1965) 2, 3, 7, 8

Retail Store Employees Union, Local 1001 v. NLRB, 627 F.2d 1133 (D.C. Cir. 1979), *rev'd on other grounds*, 447 U.S. 607, 100 S.Ct. 2372 (1980). 4

Sheet Metal Workers International Assn. v. Atlas Sheet Metal Company, 384 F.2d 101 (5th Cir. 1967). 4

Tatum v. Everhart, 954 F. Supp. 225 (D.C. Kan. 1997) 8

Webb v. American Red Cross, 652 F. Supp. 917 (D.C. Neb. 1986) 7

Statutes

29 U.S.C. § 141 9
29 U.S.C. § 1981 7
29 U.S.C. § 1982 7
29 U.S.C. § 1983 7
42 U.S.C. § 1981 8

BRIEF OF *AMICUS CURIAE* OF EMPLOYERS GROUP IN SUPPORT OF PETITIONERS

I.

INTRODUCTION

This brief is submitted, with the consent of all parties, by Employers Group to request that the Court accept for Certiorari the case of *Alta Bates Corp. v. NLRB*, 116 F.3d 482 (9th Cir. 1997).[1]

II.

INTEREST OF *AMICUS CURIAE*

Employers Group is one of the nation's largest human resources management associations, representing nearly 5,000 companies of all sizes in every industry, which collectively employ approximately 2.5 million employees. The Employers Group, formerly known as Merchants & Manufacturers Association and the Federated Employers, is integrally involved in important employment related issues. In that role, it frequently

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[1] This brief was authored solely by Lee T. Paterson, Esq. and Sonnenschein Nath & Rosenthal, counsel for *amicus curiae*, Employers Group. Employers Group is affiliated with only one wholly-owned subsidiary, Employers Group Service Corp. No person or entity other than the *amicus curiae*, its members or its counsel has made any monetary contribution to the preparation or submission of this brief.

participates as *Amicus* in many significant labor and employment cases.

III.

SUMMARY OF ARGUMENT

Employers Group urges the Court to accept the case of *Alta Bates Corp. v. NLRB, supra*, 116 F.3d 482 for certiorari to resolve the conflict between this case and prior cases in this Court and the First, Third, Fifth, Sixth, Eighth and the District of Columbia Circuit Courts of Appeals. Employers and unions have relied for thirty years on the rule that affiliated employers who did not exercise actual control over the labor relations of another company could not be joined as a single employer in bargaining units, unfair labor practices or economic action such as picketing, boycotts, and strikes. *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Services*, 380 U.S. 255, 256, 85 S.Ct. 876, 877 (1965). The *Alta Bates* decision overturns thirty years of precedent. Parent companies, subsidiary companies, partners and joint venturers, who are not involved in the labor relations of another company are subject to being dragged into labor relations conflicts which were not of their making and over which they exercised no control. The effect of this decision is to destabilize employer-employee relations throughout the United States.

IV.

ARGUMENT

A. Employers and Unions Have Relied for Thirty Years on the Decisions of the Circuit Courts of Appeals and the National Labor Relations Board Holding That an Entity was Not Part of a Single Employer Unless it Exercised Actual Control Over the Labor Relations of a Related Company.

In *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Services*, 380 U.S. 255, 85 S.Ct. 876 (1965) ("*Radio Union*"), this Court approved the "integrated enterprise" test to determine employer status. The most important but not controlling prong of that test is "centralized control of labor relations." Since the decision is *Radio Union*, until this case, the NLRB and the First, Third, Fifth Sixth, Eighth, Ninth and the District of Columbia Circuit Courts of Appeals have required that an entity must exert actual control rather than potential control to meet the test.

In 1966 the NLRB followed this Court's decision in *Radio Union, supra*, and held in *Drivers, Chauffeurs and Helpers Local No. 639 (Poole's Warehousing)*, 158 N.L.R.B. 1281, 1286 (1966) that actual rather than mere potential control of labor relations was necessary to establish single-employer status. Since that time until this case, every decision of the NLRB which discusses the issue of actual versus potential control has held that actual control of labor relations is necessary for single employer status. *See, e.g., Leisure World Sales Corp.*

Inc., 163 N.L.R.B. 668 (1967), *Fedco Freight Lines, Inc.*, 273 N.L.R.B. 399 (1984), *Emsing's Supermarket, Inc.*, 284 N.L.R.B. 302 (1987).

The Circuit Courts of Appeals for the First, Third, Fifth Eighth, and the District of Columbia Circuits have uniformly held that actual rather than potential control of labor relations is required for single-employer status. In *J.G. Roy & Sons Company v. NLRB*, 251 F.2d 771 (1st Cir. 1958) the Court held that a strike against a neutral employer was unlawful secondary activity. The Court stated, ". . . while common ownership was admitted, it was specifically found that there was no actual common control over labor policies . . . ." 251 F.2d at 773. In *Limbach v. Sheet Metal Workers International Assn.*, 949 F.2d 1241, 1258 (3rd Cir. 1991) the court sustained a jury instruction which required actual control of labor relations. The court stated "[s]ince potential control would always rest with the parent in such a situation, what is required is actual control." *Id.* at 1260. The Fifth Circuit held in *Sheet Metal Workers International Assn. v. Atlas Sheet Metal Company*, 384 F.2d 101 (5th Cir. 1967), the Sixth Circuit held in *Boich Mining Company v. NLRB*, 955 F.2d 431 (6th Cir. 1992) and the Eight Circuit held in *Bachman Machinery Co. v. NLRB*, 266 F.2d 599 (8th Cir. 1959) that there must be actual control of labor relations to determine that an employer is a primary employer for purposes of a secondary boycott. In *Retail Store Employees Union, Local 1001 v. NLRB*, 627 F.2d 1133 (D.C. Cir. 1979), *rev'd on other grounds*, 447 U.S. 607, 100 S.Ct. 2372 (1980) the court held that land title companies with common directors were not single employers. The court stated ". . . mere unity of interests is not enough, nor even is some unity of ownership; there 'must be in addition such actual or active common control, as distinguished from merely a

potential, as to denote an appreciable integration of operations and management policies.' " 627 F.2d at 1138.

Even the Ninth Circuit, in prior cases, has required actual versus potential control to determine single-employer status. In *NLRB v. Transcontinental Theaters, Inc.*, 568 F.2d 125, 131 (9th Cir. 1977) the Ninth Circuit refused to enforce an NLRB order holding that a lessor and his lessee were a single employer. The Board had determined that the lessor exercised actual control over the lessee's labor relations by placing contractual caps on operating costs in the lease. The Ninth Circuit held that the NLRB was required to demonstrate that the lessor exercised actual control rather than potential control over the lessee's labor relations. After reviewing the record, the Court found that contractual caps on operating costs were too tenuous to create actual control of labor relations, "particularly in view of the lack of evidence that respondent ever made an attempt to control . . . labor relations or policies, through its authority to determine operating costs or otherwise."

Employers and unions throughout the United States have relied on these NLRB and court decisions. This reliance has encouraged labor stability and discouraged employers and unions from engaging in unlawful activity.

B. This Decision Destabilizes Labor Relations in Bargaining Unit Determination, Unfair Practice Liability and Economic Action Such as Picketing, Boycotts and Strikes.

Due to the extensive precedent on this issue, employers and unions have known for thirty years who the responsible employer is for purposes of bargaining, unfair labor practice liability and economic action. The large number of cases which have ruled on this test is indicative of the seriousness of this issue.

Employers and Unions need to know where to draw the line. Until this decision, the line was drawn at actual behavior: an entity who chooses to take the benefit of control has to also take the burden of economic action, union recognition and liability. The NLRB and the Ninth Circuit decision, in this case, now purport to draw the line at potential control. However, in a economic society of conglomerates, joint ventures and partnerships, there is no clear line where potential control ends. Every parent company is now exposed to the labor relations problems of its subsidiaries, since, as the court stated in *Limbach, supra*, ". . . potential control would always rest with the parent . . . ." 949 F.2d at 1260. Every subsidiary is now exposed to the liabilities of its sister subsidiaries. Every joint venturer is liable for the labor misdeeds of its co-venturer. Even lessors face liability for the labor relations of their lessees. *Cf. NLRB v. Transcontinental Theaters, Inc., supra*, 568 F.2d 125.

C. This Decision Impacts Other Employment Laws Which Rely Upon the Same Test.

Courts have applied the *Radio Union* "integrated enterprise" test to claims under a number of different laws including Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Pregnancy Discrimination Act, the Ku Klux Klan Act of 1871 (29 U.S.C. § 1983), 29 U.S.C. § 1981 and 29 U.S.C. § 1982. In each of those cases, the courts have relied upon precedent requiring actual rather than potential control of labor relations.

In *Fike v. Gold Kist, Inc.*, 514 F. Supp. 722 (1981 N.D. Ala.) the Plaintiff alleged violations of Title VII of the Civil Rights Act, and the Ku Klux Klan Act for pregnancy discrimination. The court dismissed the alleged employer stating, "[i]t is well settled that the 'control' required to meet the test of centralized control of labor relations is not potential control, but rather actual control of day to day labor practices." *Id.* at 727.

In *Webb v. American Red Cross*, 652 F. Supp. 917 (D.C. Neb. 1986) the Plaintiff alleged violations of Title VII of the Civil Rights Act and constitutional guarantees of equal protection and due process. The court had to determine whether it had subject matter jurisdiction over the American Red Cross for the alleged discriminatory actions of its local chapter. The court applied the four prong test used by this Court in *Radio Union, supra*, and stated, "[t]he requisite control is not potential control, but rather actual and active control of the day to day labor relations." The court dismissed the American Red Cross from the suit.

In *Jackson v. NFL*, 1994 U.S. Dist. Lexis 8303; 65 Fair Empl. Prac. Cas. 358 (S.D.N.Y. 1994) the Court applied the integrated enterprise test to a claim of violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act. The plaintiff argued that potential control was sufficient to meet the centralized control test. The court held that in determining employer status that it is actual rather than potential control which is determinative.

In *Tatum v. Everhart*, 954 F. Supp. 225 (D.C. Kan. 1997) in determining employer status under Title VII of the Civil Rights Act and the Age Discrimination in Employment Act, the court applied the four prong test used in *Radio Union, supra.* The court stated, "[t]o establish centralized control, the parent corporation's control of the day to day employment decisions of the subsidiary must be shown. Day to day control must actually be exercised; potential control is not sufficient." *Id.* at 228.

The decision in this case, impacts the determination of single-employer status under employment discrimination laws as well as the National Labor Relations Act. This case muddies the waters where clarity is needed. Employers and employees in employment discrimination cases, need to know where liability begins.

V.

CONCLUSION

The National Labor Relations Act was enacted to promote labor peace and to prescribe the lawful rights of employers and employees. 29 U.S.C. § 141. This decision promotes confusion, litigation and economic warfare. The Court needs to draw the line between actual and potential control so that employers and unions know the point where unlawful activity begins.

DATED: October 16, 1997.

Respectfully submitted,

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No. 97-465

In the Supreme Court of the United States

OCTOBER TERM, 1997

ALTA BATES CORPORATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly determined that petitioners constituted a "single employer" for purposes of the National Labor Relations Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	17

TABLE OF AUTHORITIES

Cases:

American Federation of Television & Radio Artists v. *NLRB*, 462 F.2d 887 (D.C. Cir. 1972)	15, 16
Bachman Machine Co. v. *NLRB*, 266 F.2d 599 (8th Cir. 1959)	16
Boich Mining Co. v. *NRLB*, 955 F.2d 431 (6th Cir. 1992)	13, 14
Drivers Local No. 639 (Poole's Warehousing), 158 N.L.R.B. 1281 (1966)	14
International Bhd. of Elec. Workers, Local 613 v. *Fowler Industries, Inc.*, 884 F.2d 551 (11th Cir. 1989), cert. denied, 494 U.S. 1066 (1990)	2
J.G. Roy & Sons Co. v. *NLRB*, 251 F.2d 771 (1st Cir. 1958)	14
Limbach Co. v. *Sheet Metal Workers Int'l Ass'n*, 949 F.2d 1241 (3d Cir. 1991)	16
Local No. 627, Int'l Union of Operating Eng'rs v. *NLRB*, 518 F.2d 1040 (D.C. Cir. 1975), aff'd in relevant part *sub nom. South Prairie Construction Co.* v. *Local 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800 (1976)	2-3
Miami Newspaper Pressmen's Local No. 46 v. *NLRB*, 322 F.2d 405 (D.C. Cir. 1963)	14
NLRB v. *Big Bear Supermarkets*, 640 F.2d 924 (9th Cir.), cert. denied, 449 U.S. 919 (1980)	2

Cases—Continued: Page

NLRB v. *Carson Cable TV*, 795 F.2d 879 (9th Cir. 1986) 12
NLRB v. *Don Burgess Construction Corp.*, 596 F.2d 378 (9th Cir.), cert. denied, 444 U.S. 940 (1979) 2
Penntech Papers, Inc. v. *NLRB*, 706 F.2d 18 (1st Cir.), cert. denied, 464 U.S. 892 (1983) 12
Radio & Television Broadcast Technicians Local Union 1264 v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965) 2
Royal Typewriter Co. v. *NLRB*, 533 F.2d 1030 (8th Cir. 1976) 9, 12, 13
Sakrete of Northern California, Inc. v. *NLRB*, 332 F.2d 902 (9th Cir. 1964), cert. denied, 379 U.S. 961 (1965) 14, 15
Sheet Metal Workers Int'l Ass'n, Local Union No. 223 v. *Atlas Sheet Metal Co.*, 384 F.2d 101 (5th Cir. 1967) 16
South Prairie Construction Co. v. *Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800 (1976) 2
Vance v. *NLRB*, 71 F.3d 486 (4th Cir. 1995) 2
Wisniewski v. *United States*, 353 U.S. 901 (1957) ... 14

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 2(2), 29 U.S.C. 152(2) 2
§ 8(a)(1), 29 U.S.C. 158(a)(1) 4
§ 8(a)(5), 29 U.S.C. 158(a)(5) 4
§ 8(b)(4), 29 U.S.C. 158(b)(4) 13

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unpublished, but the decision is noted at 116 F.3d 482 (Table). The decision and order of the National Labor Relations Board (Pet. App. 5a-13a) and the decision of the administrative law judge (Pet. App. 13a-61a) are reported at 320 N.L.R.B. 1050.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1997. A petition for rehearing was denied on July 17, 1997. The petition for a writ of certiorari was filed on September 11, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 2(2) of the National Labor Relations Act (Act), 29 U.S.C. 152(2), provides, in pertinent part, that "the term 'employer' includes any person acting as an agent of an employer, directly or indirectly." Under settled decisions of the courts and the National Labor Relations Board (Board), two or more nominally separate entities may constitute a "single employer" under the Act, and in determining whether two or more entities are in fact a single employer, the Board considers four factors: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) centralized control of labor relations.[1] No one factor alone is controlling, nor is any factor a necessary prerequisite for a finding of single-employer status.[2] Rather, "[s]ingle employer status ultimately depends on all the circumstances of the case and is characterized as an absence of an arm's length relationship found among unintegrated companies."[3]

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[1] See Pet. App. 3a; *South Prairie Construction Co.* v. *Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 802 n.3 (1976); *Radio & Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965).

[2] See Pet. App. 3a; see also *Vance* v. *NLRB*, 71 F.3d 486, 490 (4th Cir. 1995); *International Bhd. of Elec. Workers, Local 613* v. *Fowler Industries, Inc.*, 884 F.2d 551, 553 n.3 (11th Cir. 1989), cert. denied, 494 U.S. 1066 (1990); *NLRB* v. *Big Bear Supermarkets*, 640 F.2d 924, 928 (9th Cir.), cert. denied, 449 U.S. 919 (1980).

[3] *NLRB* v. *Don Burgess Construction Corp.*, 596 F.2d 378, 384 (9th Cir.) (internal quotation marks omitted), cert. denied, 444 U.S. 940 (1979); see also Pet. App. 3a; *Vance* v. *NLRB*, 71 F.3d 486, 490 (4th Cir. 1995); *Local No. 627, Int'l Union of*

2. Petitioner Alta Bates Corporation (ABC) is a California non-profit corporation that coordinates the operations of non-profit hospitals and other related health-care organizations. Pet. App. 18a. Petitioner Alta Bates Medical Center (ABMC) is a California non-profit corporation that operates two hospitals in Berkeley, California. *Id.* at 19a.[4] Petitioner Pathology Institute, Inc. (PI), before its closure in 1992, was a for-profit, wholly owned subsidiary of ABC and ABMC that provided laboratory testing services to numerous physicians and hospitals in the Berkeley area, including ABMC. *Id.* at 6a, 21a, 22a, 33a.

In June 1992, ABC and ABMC closed PI for financial reasons. PI's assets were sold to a third party, except for those located at ABMC's two hospitals, which were purchased by ABMC. Pet. App. 21a-22a, 23a-29a. At the time of its closure, PI's medical laboratory technologists were represented by Office and Professional Employees International Union, Local 29, AFL-CIO (Union), and there was a collective-bargaining agreement in place between PI and the Union, effective from February 1, 1991 through October 31, 1993. *Id.* at 6a. To staff the laboratory operations at its hospitals, ABMC hired Union-represented medical laboratory technologists,

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Operating Eng'rs v. *NLRB*, 518 F.2d 1040, 1046 (D.C. Cir. 1975), aff'd in relevant part *sub nom. South Prairie Construction Co.* v. *Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800 (1976).

[4] Prior to 1992, ABMC was known as Alta Bates-Herrick Hospital. Pet. App. 20a. The name change in 1992 "caused no substantive change in the underlying entity." *Id.* at 32a. Accordingly, we refer to both Alta Bates Medical Center and Alta Bates-Herrick Hospital simply as ABMC.

all of whom had previously been employed by PI. *Id.* at 29a. ABMC and the Union negotiated a labor agreement for the medical laboratory technologists, but the employees refused to ratify it. *Id.* at 30a. Thereafter, ABMC unilaterally instituted its own employment terms and refused to recognize the Union as the employees' bargaining representative. *Ibid.*

3. a. Acting on unfair labor practice charges filed by the Union, the Board's Regional Director issued a complaint against ABC, ABMC, and PI. Pet. App. 13a. The administrative law judge (ALJ) found that "a preponderance of the evidence, viewed in its entirety, establishes [the] existence of a sufficient inter-relationship among the three entities [*i.e.* ABC, ABMC, and PI] * * * to conclude that they constituted * * * a single employer." *Id.* at 17a. He therefore concluded that the three entities violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by failing to apply PI's contract with the Union to the medical laboratory technologists. *Ibid.* The ALJ's findings respecting the factors relevant to the question of single-employer status may be summarized as follows:

Common ownership. ABC and ABMC are non-profit entities, which are operated by "members." ABC and an entity known as the Alta Bates Community Member are ABMC's "members," each of which has a single vote. Thus, ABC may "preclude action" by ABMC by "declin[ing] to vote as does the Alta Bates Community Member." Pet. App. 31a-32a. ABC and ABMC each own 48% of PI's stock, and thereby "possess ownership of * * * PI to the same degree as does any parent over its wholly owned subsidiary." *Id.* at 21a, 33a.

Common management and control of operations. In the years preceding PI's closure, there was "considerable overlap of members between the board of directors of * * * ABC and the board of trustees of * * * ABMC." Pet. App. 43a. From 1989 through 1992, a majority of the members of ABMC's board of trustees also served on ABC's board of directors, and in each of those years, the chairman of ABMC's board of trustees was also a member of ABC's board of directors. *Id.* at 43a-44a.

There was also substantial commonality of management between ABC and ABMC, on the one hand, and PI, on the other. Pet. App. 44a-45a. In 1992, two members of PI's 12-member board of directors served on ABC's or ABMC's boards, and another eight members had ties to ABC or ABMC; all ten individuals were selected to serve on PI's board by ABC and ABMC. *Ibid.* From April 1991 until PI's closure in June 1992, Robert Reed, ABC's chief financial officer, simultaneously served on PI's board and was PI's interim president and acting chief executive officer, its "highest policy-making official." *Id.* at 45a, 46a. Reed was appointed to that position by Robert Montgomery, ABC's chief executive officer and president. *Id.* at 50a.

ABC possessed "institutional and operational control" over ABMC and PI, and exercised "significant owner and membership control" over ABMC and PI. Pet. App. 41a, 47a. ABC reviewed ABMC's and PI's annual budgets, "both in the aggregate and by line item," and in certain instances ABC approved PI's budget subject to PI's acceptance of ABC's revisions. *Id.* at 47a. ABC's prior approval was required for such matters as ABMC's "major transactions or major policies" and changes to ABMC's by-laws. *Id.*

at 42a. Reed, PI's chief executive officer, and Albert Greene, ABMC's chief executive officer, both reported to Robert Montgomery, ABC's chief executive officer, regarding the overall "relationships" between the entities, and "to meet the financial targets and * * * whatever financial obligations" existed among them. *Id.* at 47a. ABC and ABMC "dictate[d] [PI's] course and, indeed, its very existence"; thus, ABC and ABMC closed PI and sold its assets without consulting the Alta Bates Community Member about the decision. *Id.* at 42a.

Interrelationship of operations. ABC, ABMC, and PI possessed "a high degree of operational integration * * * exceeding what might be expected of truly separate enterprises." Pet. App. 41a. The "most graphic display" of that operational integration was the assignment of Reed, ABC's chief financial officer, to serve concurrently as PI's acting chief executive officer and interim president. *Id.* at 24a, 40a, 45a. Further, ABMC was PI's "principal customer," accounting for about 40% of PI's revenue; Montgomery, ABC's chief executive officer, periodically contacted executives at other hospitals to encourage them to purchase PI's laboratory services. *Id.* at 34a, 40a. The prices that PI and ABMC negotiated for laboratory services that PI provided ABMC were reviewed by ABC, and Reed, as ABC's chief financial officer, became involved in pricing disagreements between ABMC and PI. *Id.* at 39a-40a.

ABC provided ABMC and PI with "core services" and "purchase services." Core services generally involved strategic planning matters, which ABMC and PI were required to buy from ABC for a fee set by ABC; the "most significant" purchase service was a "cash pool fund" established by ABC, in which ABMC

and PI participated. Pet. App. 34a-35a. Through the cash pool, ABMC granted PI a $1.1 million line of credit in 1989, and in 1990, when that loan was not timely repaid by PI, ABMC extended the loan and granted PI an additional $500,000 line of credit. *Id.* at 37a. Neither loan was collateralized by PI, and neither was repaid until PI's closure. *Ibid.* ABC received $2.1 million in loans from ABMC through the cash pool. *Ibid.* ABMC began paying PI's accounts payable in 1989 from ABMC's checking accounts, for which ABMC was reimbursed from the cash pool. *Id.* at 38a.[5]

Centralized control of labor relations. ABMC's labor relations were "directly supervised" by its vice president of human resources, Ruth Robinson; PI's labor relations were "handled directly" by its director of human relations, Beverly Chilton. Pet. App. 48a, 49a. Chilton reported directly on labor relations matters to Reed, who served as both PI's chief executive officer and ABC's chief financial officer. Reed acknowledged that, during the 14 months before PI closed, he "'would have made the decisions' concerning * * * PI's labor relations." *Id.* at 48a. Reed "admitted having been the official responsible

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[5] The ALJ noted that his finding of a "degree of operational integration * * * exceeding what might be expected of truly separate enterprises" (Pet. App. 41a) was buttressed by the facts that officials of ABC and ABMC were authorized to sign checks drawn on PI's bank accounts (*id.* at 38a); ABC, ABMC, and PI retained the same auditing firm (*id.* at 40a); ABC, ABMC, and PI retained the same law firms to handle various legal matters, including labor relations (*ibid.*); and PI leased space on ABMC's property without a written agreement, even though it had written leases for space it occupied elsewhere (*ibid.*).

for * * * PI's negotiations with the Union for a closing agreement," and "in formulating positions on labor matters, 'the parameters that are set for [Reed] are set through a budget, the global budget process,'" which was controlled by ABC. Reed reported on PI's labor matters to PI's board of directors, almost all of whom had been selected by ABC and ABMC to serve on PI's board. *Id.* at 48a-49a.

Albert Greene, ABMC's chief executive officer, "occupie[d] the same role with respect to * * * ABMC's labor relations as did Reed * * * concerning those of * * * PI." Pet. App. 49a. "Greene establishe[d] the parameters for [ABMC's labor relations] and [sought] approval and authority for his actions from * * * ABMC's governing board," a majority of whom also served on ABC's board. ABC's approval was required for ABMC's budget, and Greene was under a duty to report to ABC's chief executive officer respecting "any labor relations matter that might have an effect upon * * * ABMC's relationship with other entities." *Id.* at 49a-50a.

In addressing the factor of centralized labor-relations control, the ALJ acknowledged that "there has not been an actual exercise of labor relations control here that is so extensive and intrusive as occurs, for example, when a single proprietor operates two interrelated small companies." Pet. App. 51a. The ALJ observed, however, that the factor of centralized control of labor relations relevant to single-employer status "does not require micromanagement of each entity's labor relations by the same individual," and "[t]hat could not be expected to occur whenever entities of any size are involved." *Ibid.* The ALJ also observed that "it is not crucial that one of [petitioners'] officials did not directly

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oversee the work forces of the other two"; rather, "[i]n assessing the appropriateness of single-employer treatment, the fact that day-to-day labor matters are handled at the local level is not controlling," because the "more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries." Pet. App. 48a (quoting *Royal Typewriter Co.* v. *NLRB*, 533 F.2d 1030, 1043 (8th Cir. 1976)). The ALJ concluded that "[a] preponderance of the evidence shows that existed here." Pet. App. 51a.

b. The Board affirmed the ALJ's determination that ABC, ABMC, and PI constituted a single employer, and it specifically rejected petitioners' contention that there was insufficient evidence of centralized control of labor relations among them. Pet. App. 5a & n.1. The Board also concluded (as had the ALJ) that petitioners violated the Act by failing to apply PI's contract with the Union to the medical laboratory technologists, and further concluded (contrary to the ALJ) that petitioners had unlawfully refused to recognize the Union as the employees' bargaining representative. *Id.* at 6a-9a. The Board's order requires petitioners to recognize and bargain with the Union as the exclusive representative of the medical laboratory technologists employed by ABMC at its two hospital locations, and to make those employees whole for any losses suffered as a result of petitioners' failure to apply to them the collective-bargaining agreement between PI and the Union. *Id.* at 9a-11a.

4. The court of appeals enforced the Board's order in an unpublished opinion. Pet. App. 1a-4a. The court noted that, under settled law, "[t]o find a 'single

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employer,' all four factors [*i.e.*, common ownership, common management, interrelated operations, and centralized control of labor relations] need not be present," and that "[s]ingle employer status ultimately depends on all the circumstances of the case." *Id.* at 3a. After reviewing the principles applicable to the single-employer determination, the court ruled that substantial evidence supported the Board's determination that ABC, ABMC, and PI constituted a single employer. *Ibid.*

ARGUMENT

Petitioners contend that they do not constitute a single employer for purposes of the National Labor Relations Act, and in particular, that the Board erred in concluding that their labor relations were subject to centralized control. See Pet. 7-17. The decision of the court of appeals upholding the Board's single-employer determination as supported by substantial evidence is correct, and the court's decision does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. a. Petitioners' principal contention (Pet. 8) is that the court of appeals applied an incorrect legal standard in upholding the Board's single-employer determination. That is so, according to petitioners (*ibid.*), because the ALJ, whose decision the court upheld, ruled that "the single-employer doctrine requires only the ability or potential for one entity to exercise control over the labor relations of other commonly owned entities." There is no merit to that argument, which rests on a mistaken characterization of the ALJ's decision.

Contrary to petitioners' contention, the ALJ did not hold that, as a general rule, a mere "ability or potential" for one entity to control the labor relations of another entity by virtue of its ownership interest in that entity suffices to demonstrate common control of labor relations between those entities. Rather, the ALJ found that, although ABMC's and PI's respective human resource directors, Ruth Robinson and Beverly Chilton, handled labor matters on a "day-to-day" basis (Pet. App. 48a, 49a), and although there had not been an "actual exercise of labor relations control here *that is so extensive and intrusive as occurs, for example, when a single proprietor operates two interrelated small companies*" (*id.* at 51a; emphasis added), nonetheless, ABC "possessed the present and apparent means to exercise its clout" over ABMC's and PI's labor relations through its control over Reed and Greene, the executive officers who established ABMC's and PI's respective labor-relations policies. *Id.* at 48a-51a. In other words, the *authority* to set labor-relations policies for all three entities was actually, if ultimately, located in ABC; the responsibility for implementing those policies was remitted to the entities' responsible officials.

Thus, Reed, who was ABC's chief financial officer, also "made the decisions" respecting PI's labor relations during the 14-month period prior to its closure in June 1992, when he served as head of PI, and he was responsible for negotiating an agreement with the Union regarding PI's closure. Reed "formulat[ed] positions on labor matters," operating within "parameters" that were "set through * * * the global budget process," which was controlled by ABC. Reed reported on labor matters to PI's board of directors, almost all of whom had been selected by ABC and

ABMC to serve on PI's board. Pet. App. 48a-49a. Similarly, Greene, ABMC's chief executive officer, "establishe[d] the parameters" for ABMC's labor relations and sought "approval and authority for his actions from * * * ABMC's governing board," a majority of whom also served on ABC's board. Greene was required to report to ABC's chief executive officer concerning "any labor relations matter that might have an effect upon * * * ABMC's relationship with other entities." And, like those at PI, ABMC's labor relations were formulated within the "parameters" of a budget-approval process that ABC controlled. *Id.* at 49a-50a.

Accordingly, the facts of this case, as found by the ALJ and upheld by the Board and the court of appeals, demonstrate that ABC effectively controlled ABMC's and PI's labor relations at the policy-making level. While ABC did not engage in "micromanagement of each entity's labor relations" on a day-to-day basis (Pet. App. 51a), the courts have recognized that that circumstance is not dispositive of the inquiry; rather, "[w]here the major labor policy decisions are made by a central authority, the Board may reasonably find that the criterion of centralized control of labor relations has been met." *NLRB* v. *Carson Cable TV*, 795 F.2d 879, 883-884 (9th Cir. 1986). As the ALJ correctly ruled here, the evidence supported a finding of single-employer status among ABC, ABMC, and PI, for ABC "possessed and exercised control over critical matters at the policy level, including the present and apparent means to exercise its clout in labor relations matters." *Penntech Papers, Inc.* v. *NLRB*, 706 F.2d 18, 26 (1st Cir.), cert. denied, 464 U.S. 892 (1983); see also *Royal Typewriter Co.* v. *NLRB*, 533 F.2d 1030, 1042-1043 (8th Cir. 1976) (sustaining

Board's single-employer finding where, "[b]y staffing the division offices with [the corporation's] officers and retaining control over all fundamental decisions, [the corporation] had positioned itself to control the course of [the division's] negotiations").[6]

b. There is no merit to petitioners' contention (Pet. 8-10) that the court of appeals' decision, in upholding the Board's single-employer determination, conflicts with the decisions of other courts of appeals. The cases cited by petitioners generally recognize (as the court below recognized) that separate entities cannot be deemed a single employer or "allies" for purposes of the Act's secondary-boycott provisions (see 29 U.S.C. 158(b)(4)) based only upon the potential for operational control inherent in common ownership. For example, in *Boich Mining Co.* v. *NLRB*, 955 F.2d 431 (6th Cir. 1992), the court noted that "[c]ommon ownership and potential control of the day-

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[6] There is no merit to petitioners' contention (Pet. 13-14) that the decisions of the Board and the court of appeals rest on a "misreading" of *Royal Typewriter*. There, in upholding the Board's single-employer determination, the court noted, among other things, evidence that the controlling entity "had positioned itself to control the course of Royal's negotiations," and that "Royal's negotiators capitalized on this element of subservience in an effort to induce the Union to accept Royal's proposed termination agreement." *Royal Tyepewriter*, 533 F.2d at 1043. The court did not, however, hold that evidence of such "subservience" on the part of the controlled entity's labor officials is a prerequisite of single-employer status, but only that such evidence will support a finding of single-employer status. *Ibid.* Petitioners are therefore incorrect in asserting (Pet. 14) that "*Royal Typewriter* requires more than just the means to control labor relations; it requires an actual course of conduct at the local level to demonstrate the existence of that clout."

to-day activities of corporate divisions is inherent in every corporate division relationship"; thus, the fact that two entities are wholly owned subsidiaries of the same holding company "in and of itself is not enough to establish that the two companies are so closely entwined as to be treated as a single entity." *Id.* at 434, 435 (internal quotation marks omitted). Similarly, in *Miami Newspaper Pressmen's Local No. 46* v. *NLRB*, 322 F.2d 405 (D.C. Cir. 1963), the court observed that "common ownership alone does not suffice" to establish ally status; rather, "[t]here must be something more in the form of common control * * * denoting an actual, as distinct from merely a potential, integration of operations and management policies." *Id.* at 408-409. See also *J.G. Roy & Sons Co.* v. *NLRB*, 251 F.2d 771, 773 (1st Cir. 1958) (noting that "there must be more than the potential control inherent in common ownership" to establish ally status); *Drivers Local No. 639 (Poole's Warehousing)*, 158 N.L.R.B. 1281, 1286 (1966) (same).[7]

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[7] Petitioners also argue (Pet. 12-13) that the court of appeals misconstrued *Sakrete of Northern California, Inc.* v. *NLRB*, 332 F.2d 902 (9th Cir. 1964), cert. denied, 379 U.S. 961 (1965), in upholding the Board's single-employer determination. Even if petitioners were correct, a conflict among the decisions of one court of appeals would not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, petitioners' contention is without merit. In *Sakrete of Northern California*, the Ninth Circuit (like the Board and the court below in this case) rejected the contention that, in a single-employer determination, "centralized control of labor relations * * * must pertain to normal or current business operations at the local level"; rather, the court concluded that, "[i]f there is overall control of critical matters at the policy level, the fact that there are variances in local management

The decision below is consistent with the principles articulated in those decisions, for the ALJ's single-employer determination did not rest solely on the commonality of ownership among ABC, ABMC, and PI, or the potential for inter-company control inherent in that common ownership. Rather, in addition to its ownership interest in ABMC and PI, ABC exercised significant owner and membership control over ABMC and PI—for example, by installing Reed, ABC's chief financial officer, to run PI (Pet. App. 34a-35a, 48a-50a), and by requiring prior approval of ABMC's major transactions and major policies, and requiring ABMC and PI to submit their annual budgets to ABC for approval (*id.* at 41a-42a, 47a). There was also "a high degree of operational integration" among petitioners that "exceed[ed] what might be expected of truly separate enterprises" (*id.* at 41a)—for example, PI was dependent on ABMC's business and the operation of the "cash pool fund," in which all three entities participated (*id.* at 34a-35a); ABC's chief financial officer made PI's labor-relations decisions (*id.* at 48a); ABMC's chief executive officer sought "approval and authority" for his labor-relations decisions from ABMC's governing board, which was controlled by ABC (*id.* at 49a); and ABC and ABMC "dictat[ed] [PI's] course and, indeed, its very existence." *Id.* at 42a.[8]

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decisions will not defeat application of the 'single employer' principle." 322 F.2d at 907.

[8] Petitioners cite several other cases involving the Act's secondary-boycott provisions in support of their contention of a conflict of decisions (Pet. 9), but those cases are factually distinguishable from the present case. In *American Federation of Television & Radio Artists* v. *NLRB*, 462 F.2d 887 (D.C. Cir. 1972), the court agreed with the Board that two divisions of a

2. Petitioners also contend (Pet. 16-17) that the court of appeals' decision "effective[ly] repeal[s]" the Act's prohibition on secondary boycotts as it applies to commonly owned but otherwise "autonomously operated" businesses and "remove[s] * * * bargaining rights from employers who hire workers from businesses under common ownership." There is no merit to those contentions, for they are based, first, on the erroneous factual premise that petitioners were actually "autonomously operated," and second, on the erroneous legal premise that the Board's single-employer finding in this case was "based solely on the potential for common control of management

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corporation were separate entities, where "[the corporation's] ultimate power to control has not been exercised." *Id.* at 892. In *Bachman Machine Co.* v. *NLRB*, 266 F.2d 599 (8th Cir. 1959), the court concluded that two entities were not "so intimately and inextricably united as to constitute them one employer," where the majority stockholder of both entities participated in one entity's bargaining sessions, but not in those of the other entity. *Id.* at 605. See also *Limbach Co.* v. *Sheet Metal Workers Int'l Ass'n*, 949 F.2d 1241, 1259-1261 (3d Cir. 1991) (en banc) (jury could reasonably find that a parent corporation and two subsidiaries were not a single employer where there was evidence that presidents of subsidiaries ran them "independently" of the parent and "labor relations were intentionally kept decentralized"); *Sheet Metal Workers Int'l Ass'n, Local Union No. 223* v. *Atlas Sheet Metal Co.*, 384 F.2d 101, 107 (5th Cir. 1967) (upholding jury's finding that parent and wholly owned subsidiary were separate employers, where "the evidence is capable of supporting both the inference that [the parent] exercised actual control over [the subsidiary] and the inference that such actual control was lacking"). The differences in outcome between this case and those relied on by petitioner therefore reflect only differences in the facts, and not the application of different legal standards by the courts of appeals.

functions and labor relations." See Pet. 16. As we have explained, the ALJ (upheld by the Board and the court of appeals) determined as a matter of fact that ABC, ABMC, and PI were not "unaffiliated[] distant cousins" (*ibid.*) but were in fact closely integrated and subject to ABC's control of labor-relations policy. Nor, as we have explained, did the ALJ base his single-employer finding solely upon the "potential" for control inherent in petitioners' common ownership. There is accordingly no reason to regard the Board's decision, or that of the court below enforcing it (which in any event is unpublished and without precedential value, see Pet. App. 2a n.*), as having changed existing law in the respects asserted by petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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